



San Francisco Law Library


No. 77024

Presented by

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

1293

No. 3691

1294

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

**NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,**

Appellant,

vs.

**LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,**

Appellee.

VOLUME II.

(Pages 385 to 714, Inclusive.)

**Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.**

FILED

JUL - 2 1921

**F. D. MONCKTON,
CLERK.**

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,

Appellant,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,

Appellee.

VOLUME II.

(Pages 385 to 714, Inclusive.)

Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.

(Testimony of Arthur Lakes, Jr.)

Q. Part of it is due to the throw.

A. I testified that it was partially breccia.

Q. Now, then, coming back again to the surface, if, as a matter of fact, there would be a displacement on the level of only 25 feet, you ought to find quartz on the west side [363] of the fault in Trench 558, shouldn't you?

A. You do find a little quartz right here.

Q. Well, why don't you mark it? Where?

A. Near 558.

Q. On the west side of the fault?

A. To the west side of that.

Q. Let me come back to the Black Tail vein. What is the apparent displacement of that vein on the level?

A. As I measure it, the distance between the two segments of the vein is about 50 feet.

Q. Whereabouts did you make that measurement? A. I made it here on the model.

Q. That is on the—

A. Horizontally matching up the two segments of the vein.

Q. But you didn't find that faulted segment 50 feet away on the west side of the fault in the trench 558, did you? A. I didn't drive that tunnel.

Q. It is open. Anyone can look at it, can't they?

A. Yes.

Q. Where do you find it 50 feet away from the point where once before you said it was faulted on No. 2 level?

A. What vein are you speaking of now?

Q. The Black Tail vein. Let's keep one at a time.

(Testimony of Arthur Lakes, Jr.)

You said it was faulted near the sand winze.

A. There is the Black Tail vein right there.

Q. Didn't you tell me that there was a displacement of—how many feet?

A. Following the fault, but I explained to you at the time that the relation of the two segments was 45 feet. [364]

Q. Each time when we come to the apparent displacement you go back to the displacement along the plane of the fault. What is the plane of the fault there? A. Right there?

Q. Along the plane of that fault, what is the apparent displacement? A. About 100 feet.

Q. Along the plane of the fault, what would be the apparent displacement in 558—one hundred feet? A. Yes.

Q. Now, then, to make it clear again, the apparent displacement along the plane of that fault, of the red vein, is 25 feet; and of the yellow vein 100 feet. Is that correct? A. No.

Q. Tell me what is, then.

A. The apparent displacement is 100 feet along the plane of the fault for the Lone Pine No. 2 vein. The throw is about 25 feet.

Q. The apparent displacement is 100 feet on the level. A. About 100 feet.

Q. Now, then, we will come back again to the composite map. Show his Honor where there is a throw, an apparent throw along the plane of that fault, of that red vein, of 100 feet.

A. I don't show a throw. I said about 25 feet.

(Testimony of Arthur Lakes, Jr.)

Q. Along the plane of the fault.

A. Along the plane of the fault, about 100 feet.

Q. And do you want his Honor to understand for 100 feet along there, what you have marked in red, on the west side [365] of that fault, that that is all drag material.

A. It might be that the Lone Pine comes—the Lone Pine vein comes in here. I don't know. A little further work would determine that, but I got drag material through to about 231 plus 10.

Q. How many feet of drag material did you get along there? A. Oh, it is not crosscut.

Q. I mean in length.

A. There is some brecciated quartz at Station 151-C and 331 and at 331 plus 10. Beyond there I didn't take samples.

Q. Now, you know very well whether these bands of quartz that I referred you to before, that are near the foot of this little working 331½, that you found here, from there on, and up in the left, from there on—

A. These are not brecciated.

Q. Those are not brecciated?

A. No, but how far back from the gouge, I don't know.

Q. Now, the throw of the yellow vein along the plane of the fault is how much?

A. About 40 feet.

Q. Along the plane of the fault, the apparent displacement is 40 feet, isn't it?

A. Are you speaking of the displacement of the two segments?

(Testimony of Arthur Lakes, Jr.)

Q. Yes, sir. A. About 40 to 45 feet.

Q. That is as the Court would look at it on a map? [366]

A. If you take one segment of the vein and the other, this distance in here would be about 40 feet.

Q. Along the plane?

A. Along the plane of the fault would be in excess of that.

Q. About how much? A. About 90 or 100 feet.

Q. Now, come over here and see what is the matter with Mr. Burch's model 31. He shows more displacement of the yellow, than he does the red one.

A. Mr. Burch introduced that.

Q. You made it. A. I made it.

Q. Now, is it correct, or isn't it, in your judgment?

A. It is correct as near as the straight lines—which we had to saw—would make it, with the possible exception that this Lone Pine No. 2 at the southwest would possibly be more in this direction, with a little bit larger displacement, as it has apparently at the points of intersection of the red—the points of intersection there with the yellow, would be pretty near the same on both sides.

Q. But it is not so shown on the model.

A. On the model, you cannot see the faults and the veins in the curved lines that they take.

Q. You could put them on so that one does not appear to have half as much again displacement as the other, can't you?

(No answer.) [367]

Q. As a matter of fact, that is purely diagram-

(Testimony of Arthur Lakes, Jr.)

atical, and does not represent the actual condition on the ground. A. I didn't introduce it.

Q. You see it. I asked you if it is not purely diagramatical and does not represent the actual conditions on the ground.

A. It represents them as nearly as possible under the conditions under which it was made.

Q. Now, I want to ask you, what is the distance between the quartz which you have marked yellow in 558, on the east side of that blue streak and the quartz which you have marked red?

A. About 18 feet.

Q. Isn't it a fact that on the east side of that trench, the Court can follow continuous quartz between these two?

A. If he can follow continuous quartz, on that strike and that dip, he can do more than I can.

Q. Isn't it true that you can follow continuous quartz in Trench 558 from its mouth, clear through to the open stope at the other end?

A. There is a break in here.

Q. Of about 8 feet? A. No.

Q. How many feet?

A. I testified that there was a little drag or brecciated ore along north of this yellow line. I testified to that.

Q. Well, how far north? A. About 8 feet.

Q. Eight feet. [368] A. Yes.

Q. How many feet is there in there that he cannot follow quartz? A. Between 8 and 10 feet.

Q. Between 8 and 10 feet within that tunnel 558, you say you cannot follow quartz?

(Testimony of Arthur Lakes, Jr.)

A. Cannot follow quartz with the strike of either one of the approximate—approximate with either one of these veins.

Q. Let's leave that out. Isn't it true that he can follow quartz? Now, we will leave out the strike and dip and so forth—follow continuous quartz in that trench from its face to its mouth.

A. I couldn't.

Q. You couldn't? A. No, sir.

Q. And there is a difference of ten feet in which you say there is no quartz?

A. Approximately 10 feet.

Q. Approximately 10 feet there? A. Yes.

Q. About this work on 331½. You had charge of the driving of that work, didn't you? A. Yes.

Q. You know Mr. Bailey, don't you? A. Yes.

Q. Didn't you have a conversation with Mr. Bailey at the mine in which you said that you didn't think it was good business to continue that work on 331½; that the ore [369] at 331 you thought would cut off or would swing around to the southwest?

A. I did not.

Q. And that you would rather not run the drift that some of the others wanted you to to?

A. I did not.

Q. Didn't you say to Mr. Wethered—you know Mr. Roy Wethered? A. Yes.

Q. That this drift was not run with your approval because you thought it would help us by showing the quartz actually swung around to the—

A. I did not. I said to Mr. Wethered—or the only expression that I made about this drift that if

(Testimony of Arthur Lakes, Jr.)

the condition of the ground had been different, I would have preferred to have gone in more on a straight line.

Redirect Examination.

(By Mr. COLBY.)

Q. Is the quartz plainly apparent along the right-hand side of this drift in the vicinity of point 331?

A. Yes.

Q. So that where this drift was turned off to the left, and to the south, the quartz was left still on the right-hand side going in?

A. It was left at the point marked on this map at 331½, or in that immediate vicinity.

Q. And that work was done by the plaintiff, was it not? A. Yes. [370]

Q. Now, what was the reason that you did not connect this work through from this incline to this little stub cutting out from 331½?

A. The time was too short.

Q. What time did you have to do that?

A. Less than two weeks.

Q. How long would it take?

A. It would take at least ten days of hard work.

Mr. GRAY.—We are perfectly willing that that time should be taken and the work done and your Honor observe it.

Mr. COLBY.—We will be very glad to do it, if your Honor wishes it done.

Mr. GRAY.—Any work that is going to assist—

The COURT.—It is a very important connection for the purpose of this trial, it seems to me.

(Testimony of Arthur Lakes, Jr.)

Mr. COLBY.—We asked to have this work done, if you Honor pleases, about a month prior to the trial.

The COURT.—I will determine that question later.

Mr. COLBY.—And by the time that we got permission, it was within a couple of weeks of the trial, and rather than ask for a continuance, in view of the fact that all our witnesses were ready to come, we decided to go ahead with the trial in spite of the fact that we had not at that time connected that through.

Q. Now, coming over to the other map. Mr. Gray asked you why it was that you didn't have yellow showing—that is a continuation of the Black Tail, showing on the other side of the fault at the surface here. Is it not a [371] fact that you have immediately underground there an exposure of what you consider the probable extension of the Black Tail? A. We have.

Q. Where is that?

A. At Station 64-C, underground.

Q. That would be in this vicinity?

A. In the vicinity here.

Q. How far is that below the surface—a few feet only, is it not?

A. About 30 feet—35 feet.

Q. About 35 feet underground?

A. I should judge so.

Q. So you actually have an exposure of the Black Tail vein on the left or the west side of the fault?

A. Yes.

(Testimony of Arthur Lakes, Jr.)

Q. In that immediate vicinity? A. Yes.

Q. Now, when he was asking you about the throw of the fault, or the apparent misplacement, and the measurement between the different sides of the different parts of the vein on the opposite side of the fault, on a horizontal plane, did you take into consideration in your answer the effect that would be created by a vein of considerable width?

Mr. GRAY.—This man is an expert and I have no objection to your asking him what he took into consideration, but I don't think you ought to suggest the answer.

Mr. COLBY.—I want to get this thing straight.
[372]

Mr. GRAY.—Yes, I do, too, but I would rather he would testify to it than you.

A. I didn't get your question.

Q. I say that in this horizontal displacement, that Mr. Gray was asking you about, on the opposite sides of the fault, did you take into consideration the result of the displacement of a vein of great width?

A. In measuring, measuring from this point to this point?

Q. What points are those?

A. From a point just north of 151-C on the composite map the point labeled on defendant's map about 334½.

Q. Is it not a fact that in these measurements, you were taking a theoretical vein of no width?

A. I was.

(Testimony of Arthur Lakes, Jr.)

Recross-examination.

(By Mr. GRAY.)

Q. Now, about this so-called Black Tail vein on the surface, you say— A. Not on the surface.

Q. That is not? A. No, sir.

Q. You say it is just a little below the surface at 64-C? A. Yes, sir.

Q. As a matter of fact, this surface is open to very careful examination? The wash is pretty well off of it?

A. The wash is quite heavy over through here. [373]

Q. About where this old discovery vein is and down in that direction.

A. The wash is heavy, very heavy.

Q. You can observe the outcropping of these veins?

A. No, not from here. From this point, where the cliff breaks off down to the side-line, it is not easy to see outcroppings, with a possible exception of a little point right down in the vicinity of the railroad.

Q. Would this Black Tail vein come through there as you have it delineated? Couldn't come any place else, could it?

A. It would approximately outcrop about here.

Q. Then it would go through this long trench of yours and you didn't find it?

A. I didn't say it would go through that long trench.

(Testimony of Charles P. Robbins.)

Q. You didn't find it there?

A. I didn't find it, no.

Witness excused. [374]

Testimony of Charles P. Robbins, for Defendant.

CHARLES P. ROBBINS, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. COLBY.)

Q. What is your name? Where do you live?

A. Charles P. Robbins; Spokane.

Q. What is your relation to the defendant company? A. President.

Q. Are you familiar with the property here in dispute? A. Yes, sir.

Q. How long have you been familiar with that?

A. Since its location almost; since September, 1896, I first saw it.

Q. You were one of the original locators that appeared upon the location? A. Yes, sir.

Q. But were not out on the property?

A. No, I was not present when it was located.

Q. And your first visit to the property was at what time?

A. About the middle or latter end of September, 1896.

Q. Who did you go out with at that time?

A. Mr. Creasor.

Q. And who was Mr. Creasor?

A. Mr. Creasor was the locator.

(Testimony of Charles P. Robbins.)

Q. He was one of the locators?

A. One of the locators. Mr. James Clark and myself grubstaked Ryan and Creasor, the prospect on the reservation. [375]

Q. And the 4 of you appeared on the location notice? A. Yes, sir.

Q. When you went out there with Mr. Creasor, what was the object of going out in September of 1896?

A. We had a proposition from Mr. Patrick Clark to take an option on the property. Mr. Creasor was sick of typhoid. I was working for Mr. Clark at the War Eagle at the time and he told me to get a notary and go into Republic, that he was afraid Mr. Creasor was going to die and that he should get his signature to this option that he was to take.

Q. Did you visit the property at that time with Mr. Creasor?

A. Yes, sir; I found him much better, and he took me up to the property.

Q. He had recovered sufficiently for you to go upon the property? A. Yes, sir.

Q. Did you go upon the Lone Pine claim at that time? A. Yes, sir.

Q. And did Mr. Creasor point out the corners to you?

A. He pointed the direction. I did not go to each corner.

Q. Did he point out the discovery to you?

A. We went up to the discovery.

Q. Where is that discovery? Is it what is shown

(Testimony of Charles P. Robbins.)

on the various maps and the model as the discovery point? [376] A. Yes, sir.

The COURT.—What is the date?

Mr. COLBY.—September of 1896.

The COURT.—When was the location?

Mr. COLBY.—The location was in February of 1896.

Mr. GRAY.—I don't think it is material.

Mr. COLBY.—Yes, I think it is quite material.

Mr. GRAY.—It is self-serving for one locator to tell what another one did. Well, go ahead, you have Mr. Creasor here anyhow.

Mr. COLBY.—Mr. Creasor is going to testify.

Q. Did you ever do any work on this property, or was work done under your direction?

A. Yes, sir.

Q. About when did you start work?

A. Why, work was started in October of 1896.

Q. And how long did you remain interested in the property?

A. I am still interested, and have been all the time.

Q. I mean in the Lone Pine.

A. Oh, until 1909, sold it to Mr. Harper.

Q. As I understand it, at the same time you located the Last Chance, that is, the same locators?

A. Yes.

Q. About the same time. That shows in the pleadings, a day later. There is no controversy over that, as I understand it. How many years was that that you were interested in the Lone Pine? [377]

(Testimony of Charles P. Robbins.)

A. Well, from 1896 to 1909.

Q. That is something over 13 years? A. Yes.

Q. And during that period of time did you carry on operations on the property?

A. Yes, sir; at different periods.

Q. Did you visit the property frequently?

A. Yes, sir.

Q. And where did you live most of that time?

A. I moved to Republic in 1897 to take charge of the Republic mine.

Q. How long were you there with the Republic Mine?

A. Well, I was there that fall, and went to California that winter, and came back in the spring, and was at Republic for a few months, and then I resigned and moved to Spokane.

Q. You kept in touch with the Lone Pine during that time, and the work that was being done?

A. Yes, sir. I hadn't anything to do with the management of the Lone Pine until November of 1900. I was elected President on November 12, 1900, and have continued since.

Q. What was the first work on the Lone Pine looking toward mining operations?

A. The driving of adit No. 1 as far as the No. 2 vein.

Q. That is what is commonly referred to as the No. 1 tunnel? A. Yes, sir. [378]

Q. How long did you continue that tunnel in?

A. We continued the tunnel until we crosscut the

(Testimony of Charles P. Robbins.)

vein, and it was very low grade at that time, \$5 ore, and we quit.

Q. Point that out to his Honor on the model.

A. That is this vein here.

Q. That is the one that has been referred to as the No. 2 vein, is it not? A. Yes.

Q. And you say the values that you found there were low grade?

A. Oh, as I remember it, between \$4.50 and \$5.00. This work was done before it was incorporated, you understand, as partners. Mr. Patrick Clark bought a quarter interest from Ryan and joined us in the operation of the mine, he paying a quarter of the expense up to that period.

Q. And later on you incorporated a company and turned it over to the company; is that a fact?

A. Yes, sir; but not the present company.

Q. Another company. A. Yes.

Q. Did you continue driving that tunnel ahead?

A. No, we stopped work there for a time.

Q. Well, after that was that tunnel driven under your direction?

A. No, Mr. Creasor drove this tunnel. We were putting up the money. We were living in Rossland and sent him our proportion of the money. [379]

Q. How far ahead was that tunnel driven finally before you stopped it, when you were connected with the property?

A. I have always been connected, but it was driven—it crosscut the vein when we stopped, and I don't think any more work was done on that

(Testimony of Charles P. Robbins.)

tunnel until after we incorporated as the Lone Pine Consolidated.

Q. You were interested in the Lone Pine Consolidated? A. Yes.

Q. You continued as the Lone Pine Consolidated in driving the first tunnel?

A. The Lone Pine Consolidated under Mr. Clark's management.

Q. And you were there?

A. I was in Republic; yes.

Q. How far out was it driven under that management?

A. This tunnel was driven right to where it intersects No. 4 vein and drifted on No. 4 vein each way to its present face.

The COURT.—About what date was that?

A. That would be between 1897 and August, 1900.

Q. During those three years.

A. Mr. Clark resigned in 1890, and then I was elected President and have been continuously since.

Q. And did you carry on any mining operations on the No. 4 vein? [380]

A. Yes, sir; I stoped these here.

Q. And roughly, how many tons were produced under your management from the No. 4 vein?

A. Well, I have got the production of the No. 4 vein partly under my management and partly when it was under lease to Harper. I can tell you the amount that was in that body, and then what came below, 3,050 tons of the value of \$125,000 gross smelter value.

(Testimony of Charles P. Robbins.)

Q. Your operations here on the No. 2 vein were carried on in what manner from that tunnel?

A. You mean from the time I took it?

Q. Yes.

A. I commenced to stope this ore out, and in—

Q. In just a rough way can you tell how much stoping had been carried on when you operated your company? A. I have a map of it.

Q. We don't care to go into that.

A. Well, this stope is entirely west of the No. 1 tunnel, and it came up to within about 40 feet of the surface here, and then it dropped down and we followed the better ore. We came down here and then I ran this drift in here about 10 feet and took out some ore there and stoped for probably 20 feet. Then a little stope probably 15 feet high above the level here, and about 18 inches to 2 feet wide.

Q. That was the No. 1 level?

A. That was the No. 1 level.

Q. Could you tell approximately the tonnage that was taken out of the No. 2 vein? [381]

A. On the No. 1 level?

Q. Yes. A. Roughly, 5,000 tons.

Q. Could you give an approximation of its value?

A. Why, its assay value was about \$17 a ton. I can give you the actual figures.

Q. When did you go to work on the Last Chance claim actively? A. September 15, 1916.

Q. As I understand it, the Last Chance was also

(Testimony of Charles P. Robbins.)

located by yourself, Mr. Creasor, Mr. Clark and Mr. Ryan? A. Yes, sir.

Q. And that claim was comparatively idle?

A. Yes, sir; there has never been any development work except this crosscut that was run from No. 1 tunnel running southerly. That was done by Mr. Clark. That was the only work done on the Last Chance, with the exception of a few surface cuts.

Q. That is the crosscut running out at 166-C?

A. Yes. It shows across the line here. [382]

Q. When was that work done?

A. Which, this?

Q. No, this work that crosses the line?

A. That was done by Mr. Clark during the period that he had this in 1899.

Q. Prior to 1900? A. Yes, sir.

Q. That was 20 years ago? A. Yes, sir.

Q. Now, this Last Chance claim was owned all that time by the same company that originally owned the Lone Pine? A. Yes, sir.

Q. And the company was largely composed of the original locators, that is the original locators had interests in that company? A. Yes, sir.

Q. And they are still interested in the Last Chance? A. Yes, sir.

Q. Now, you say they began the development in September of 1916?

A. Yes, sir; September 15th.

Q. And what did you do in the way of development?

(Testimony of Charles P. Robbins.)

A. I commenced to grade for the boiler and compressor preparatory to sinking the shaft. We got that work completed and the machinery installed and commenced sinking the shaft November 8th or 9th. [383]

Q. When did you reach the vein?

A. About April, 1917.

Q. (The COURT.) What was the distance approximately?

A. Five hundred feet. We sunk 30 feet below the level for a sump. We intersected the vein at about 488 or 489 feet, I should say. We passed through the vein in this corner at the 500 point.

Mr. COLBY.—Q. When was it that you were first notified by any representative of the plaintiff that they had a claim on this ore that you were mining? A. In April, 1919.

Q. That would be nearly 2 years after you intersected the vein. That was the date that you intersected the vein?

A. I can't get it exact, but it was during April of 1917.

Q. When you first visited the Lone Pine claim here was there any exposure of a north and south vein running through the Lone Pine property to your knowledge? A. No, sir; there was not.

Q. And when did you first ever see any exposure of a north-south vein on that property?

A. Why, I cannot be sure as to the date, but I think it was about 1900.

Q. Where was that exposure made?

(Testimony of Charles P. Robbins.)

A. About this point. There is an open cut there that exposed the vein about 21½ feet wide. It is in that proximity there, just south of this little [384] raise that comes through. It would be a little south of a point 537. Have you made any investigation of this discovery vein, Mr. Robbins?

A. Yes, sir; I have examined it.

Q. And what do you find there running through the discovery point?

A. Right opposite the stake, what we call the discovery point, it run about 17 inches of quartz.

Q. Now, passing down to the west, you find quartz, do you not, on the west side-line?

A. Yes, sir.

Q. How was it passing down to the east?

A. There is a little interruption at a couple of points, two points, I think.

Q. Is there any doubt in your mind but what those veins there continue across the side-line?

A. No, sir.

Q. What is the general relation of all those veins that you find, cross-veins, in the Lone Pine?

A. Northeasterly and southwesterly.

Q. And they are approximately parallel, are they not? A. Approximately parallel, yes, sir.

Q. Now, you have also examined these workings since this litigation started, have you not, from time to time? A. Yes, sir.

Q. And before you sold the property you had [385] considerable familiarity with the conditions that were exposed in those workings at that time?

(Testimony of Charles P. Robbins.)

A. I had.

Q. I will ask you if you will describe in a general way on this model what you think of the exposures there on the number 2 Lone Pine, and any extension of it in any direction; just tell the Court in your own way what you think about it?

The COURT.—In what respect?

Mr. COLBY.—As to the exposures there, I call your attention particularly to these trenches there crossing the side-line of the Lone Pine claim?

A. There is on what we call the railroad cut here, there is a good strong exposure of quartz, a good vein, having approximately the same strike and dip of the No. 2 vein, and I believe that to be a continuation of it.

Q. What is the width of the quartz shown here?

A. It varies; 3 feet; and in one place it is fully 6 feet. There may be a little inclusion of country rock at that point.

Q. Is that frequent, that you find country rock?

A. We find it all through the stopes of the Last Chance.

Q. It is characteristic of that country, is it not?

A. Yes, sir.

Mr. GRAY.—What is that, the country rock?

[386]

Mr. COLBY.—The inclusions of country rock and vein material? A. Yes, sir.

Q. Are you familiar with the stoping that was done here, that was done under your management?

A. Part of it was done under my management

(Testimony of Charles P. Robbins.)

and part of it was done since I ceased to have anything to do with it. I do not know whether it was done by Harper or done by the Northport people.

Q. What is your idea of that occurrence in there?

A. When I first found this vein coming in here, I thought I had discovered a new north and south vein, and we stoped a few cars of ore out and later on some leasers, I think it was, looked for it on No. 2. When we got down to it we could not find it, but we did find a stringer coming up on the hanging-wall here, which was comparatively good ore which afterwards has been stoped out, but not during my management. Now, whether this continues or whether that turns, I won't say. It apparently does here, but this may continue on here. There is a streak of ore running this way at this point.

Q. Running which direction?

A. That would be northeasterly, a little more easterly than the main vein. Whether that comes back in here or not I don't know.

Q. Did it have the appearance to you of a spur for a main vein? A. Yes, sir. [387]

Q. With the country rock included between the spur and the main vein?

A. Yes, sir; there is country rock between.

Q. Did you take any assays of this vein passing through the discovery and in that vicinity and in that direction? A. Yes, sir.

Q. Tell the Court where you took those assays?

(Testimony of Charles P. Robbins.)

A. Beginning at the discovery cut I took—do you want the exact distance?

Q. Just approximately?

A. Thirty-one feet. Well, I went west 31 feet practically; in the east side of the discovery cut every six feet, and 28 feet east of that, and went right at the nearest point of the discovery post, $31\frac{1}{2}$ feet from the east side of the cut.

Q. Did you have those samples assayed?

A. Yes, sir.

Q. Have you the assay returns? A. Yes, sir.

Q. I presume that we will not be called upon to produce the assay. Have you got a little plat that shows the position, the position of these samples or can you identify them on the map?

A. I have no plat, but I can tell you where they were taken.

Mr. COLBY.—In the interest of expediency, I will ask Mr. Robbins in connection with some of these [388] surveyors, to put these numbers on a plat. You can do that between now and tomorrow. We will offer this; they are values of the returns from these various samples taken in the vicinity of the discovery going each way, running from two and a half to seven and a half dollars, and we will be asked that this be marked the next exhibit number in order.

(The said assays sheet return was marked Defendant's Exhibit No. 33.)

Mr. COLBY.—I think that is all of the direct examination.

(Testimony of Charles P. Robbins.)

Cross-examination.

(By Mr. GRAY.)

Q. I want to get an idea of how familiar you were with those claims prior to the summer of 1897?

A. Why, I simply went up there in 1896.

Q. Just once.

A. And then back. Yes, sir. But I kept in touch with it through Mr. Creasor writing me.

Q. Yes, through correspondence, but I mean from your personal acquaintance. That is the only time you were on the ground?

A. In 1896; yes, sir.

Q. How long were you up there?

A. I was up there 2 days.

Q. Did you go over the ground pretty well at that time? A. Yes, sir. [389]

Q. I suppose you saw the croppings near the westerly end of what is now that open stope near Station 545?

A. No, I did not see them as far west as the end of that open stope.

Q. About the west end of the open stope?

A. I saw the croppings that run along there; I won't say how far west they go.

Q. At about the end, I say, of that stope? They are still there, aren't they—you can see them there to-day?

A. You are not pointing to the end of the stope, Mr. Gray?

Q. Yes, I am.

(Testimony of Charles P. Robbins.)

A. You are pointing to the east end of that stope.

Q. No, I am pointing to the west end. West is on your left always when you are looking at the map. A. Here is the west end of this stope.

Q. I am speaking of the west end of the open stope near Station 545.

A. Yes, I see it, but here is the west end of the open stope.

Q. That is another stope.

A. They are all connected.

Q. At about Station 545, there were some croppings there, weren't there? A. Yes, sir.

Q. They are there to-day? A. Yes, sir.

Q. You saw them at that time, didn't you? [390]

A. Yes, sir.

Q. Did Mr. Creasor point those to you?

Q. We went up to them together.

Q. Did you go along and follow up the claim to the discovery point, the point where the notice was posted? A. Yes, sir.

Q. Was the notice still there?

A. I cannot recall *where* it was or not.

Q. He pointed that out to you?

A. Yes, sir; I examined the post; I think it was marked discovery post.

Q. At that time the trench—

A. I saw no trench.

Q. There was not any trench there at that time at the discovery point? A. No, sir.

Q. That was put in later?

A. I don't know when it was put in.

(Testimony of Charles P. Robbins.)

Q. It was not there in September?

A. It was not there to my knowledge.

Mr. COLBY.—You do not contend there was any discovery requirement at that time under the Washington law?

Mr. GRAY.—No, I do not, and I am going to have to amend my complaint I alleged that he did do that at that time, but I will amend it in that respect because I assume it is not true. [391]

Mr. COLBY.—That is all right; we will assume that it is stricken out.

Mr. GRAY.—Q. There was a little work done, however, at the face of these croppings near Station 454, wasn't there?

A. I think it is a little easterly of the end of that stope, yes, there is a little work there.

Q. Was there any other work done on the claim?

A. I think there is what we call a little cave near this station of the tunnel.

Mr. COLBY.—Where is that?

A. It would be north of 550; it is what we call a little cave, and there had been a little picking down there, but no considerable work.

Mr. GRAY.—Q. Any quartz exposed there?

A. Yes, sir; there was quartz there.

Q. Did you go on up to the northern end of the claim? A. Yes, sir.

Q. There were some croppings up there, weren't there? A. Yes, sir.

Q. You did not attempt to follow, though, any of those veins at that time?

(Testimony of Charles P. Robbins.)

A. Well, yes; we looked along—to follow them clear across the claim you mean?

Q. Yes, sir. A. No, sir. [392]

Q. Or to determine where they crossed in or out of the claims?

A. No, sir; we just saw that they were east and west veins.

Q. East and west veins?

A. That is, northeast and southwest veins. I was under the impression that we had a north and south vein from the way the claim was located, but we did not find it.

Q. You found, however, outcropping of veins going up there? A. Yes, sir.

Q. You were interested in the claim at the time the patent was applied for? A. Yes, sir.

Q. It was applied for in the name of your partner, Mr. James Clark? A. Yes, sir.

Q. You are familiar with the manner in which it was surveyed?

A. I was not on the ground when it was surveyed, I was busy at Republic.

Q. You were familiar generally with the lines and location as it had been pointed out to you?

A. Yes, sir, generally. I wont say that those are where the original corner posts were by any means.

Q. No, but in substance approximately, running generally in a northerly and southerly direction?

A. Yes, sir. [393]

Q. And you and your associates so applied for a patent to that claim from the Government of the

(Testimony of Charles P. Robbins.)

United States? A. Yes, sir.

Q. Asking the Government to patent to you 1500 in length and 300 feet on each side of the center?

A. I don't know the exact length or exact width of it.

The COURT.—That record is in evidence. It speaks for itself.

Mr. GRAY.—Q. When was this trench over here on the south side of the creek first put in?

A. What trench are you referring to?

Q. The one which you say you saw a vein in having a northerly and southerly course?

A. I don't know when that was done.

Q. When did you first see it?

A. I think in the latter part of 1899 or 1900—not this present trench—

Q. No, but one covering approximately the same vein shown in that trench? A. Yes, sir.

Q. While you were operating how far to the southwest did you work on this vein?

A. On what level?

Q. On any level; I don't care.

A. I did not do any work on the No. 1 level west of the Adit tunnel. The drift was in approximately [394] 90 feet, but I did no work on that. I started this tunnel—where is that No. 2—I started this tunnel on March 15th, 1901, and then we put a raise through. It is obliterated now, on account of an open stope.

Q. I don't care for too much detail. On No. 1 level you did not mine any west of the tunnel?

A. I did not mine any west of the tunnel.

(Testimony of Charles P. Robbins.)

Q. But there was a drift over there about 90 feet?

A. There was a drift over there of about 90 feet.

Q. On No. 2 level how far west or southwest?

A. Did you stope?

Q. Yes.

A. Well, from the crosscut to the vertical shaft, about 20 feet. That did not go clear through to the level, it went up about 20 feet, we put a raise up and connected those levels.

Q. You did all your work on that level from there east?

A. No, sir; on this level we run about 40 feet and put up a small stope there. This point was where I first spoke of the 20 feet. Afterwards this tunnel was driven on to the east end-line and then this shaft was started later along—

Q. That is the Lone Pine shaft?

A. Yes, sir; 1903 or 1904.

Q. From that you worked the No. 3 level? What direction did you work it? [395]

A. I drove a crosscut. We had what we supposed was a hanging-wall of a vein. We drove through about two or three feet of porphyry at this place.

Q. That is in 2, isn't it?

A. Yes, sir; that is in 2 and discovered about 4 feet of quartz here. This was driven on and a part of that shaft sunk and then we sunk from No. 2 on down.

Q. Did you work southwesterly of the shaft on the No. 3 level? A. Yes, sir.

Q. When?

(Testimony of Charles P. Robbins.)

A. As soon as the shaft was completed. I can give you the dates.

Q. I don't care for the dates exactly; how far?

A. We worked as far west and run this little crosscut here.

Q. That is to station 78-C?

A. Yes, sir; run a crosscut to the hanging-wall there.

Q. Did you follow the vein on to the south?

A. No, sir; I did not get any vein there, and our values above were more to the northeast and we had no money to prospect with.

Q. Did you work the No. 4? A. No, sir.

Q. That is as deep as you went?

A. That is as deep.

Q. What is the fact as to that being a tight vein [396] in there or did you have some gouge movement along there on the No. 3?

A. At that point I would say it was a tight vein.

Q. You did not find any gouge along that vein?

A. I don't recall any.

Q. Did you on any of those levels?

A. In the Lone Pine?

Q. Yes, sir.

A. Yes, sir; I did. I drove this crosscut.

Q. On No. 2 tunnel?

A. On 2, we drove this crosscut here and cut this vein, about 2 1/2 feet of quartz and then we found gouge on that side of it.

Q. On which side, the hanging?

A. On the east side, the hanging side; yes, sir.

(Testimony of Charles P. Robbins.)

Q. You found how much quartz there?

A. We went through from 2 1/2 to 3 feet.

Q. And then you came into the gouge?

A. And then we came into the gouge.

Q. Then did you find more ore on the other side of the gouge, or quartz?

A. Well, I don't know whether I found it or whether I have seen that since; I won't say.

Q. But the gouge is there, and the ore on both *side* in that No. 1 crosscut? [397]

A. This little drift was not run by me. The cross-cut simply was run and that gouge has caved since. It was only the size of the drift when I left it.

Q. How thick was that gouge seam?

A. I don't know that we penetrated clear through it. There must have been a couple of feet of it.

Q. A couple of feet of gouge?

A. As I remember it.

Mr. GRAY.—That is all.

Redirect Examination.

(By Mr. COLBY.)

Q. I want to ask you, Mr. Robbins, in carrying on your mining operations underneath the Last Chance here, whether you were working there with the belief that you owned that vein that you were working on? A. Most assuredly.

Q. And even after this suit was started, the additional work that you performed, after that, before you shut down, you also believed that you owned that property?

A. I never believed anything else and I don't now.

(Testimony of Charles P. Robbins.)

Mr. COLBY.—I think that is all.

Witness excused.

(Thereupon an adjournment was taken until tomorrow, Thursday, August 26th, at 10 o'clock A. M.)
[398]

Thursday, August 26, 1920, at 10 o'clock A. M.

Trial resumed.

CHARLES P. ROBBINS, recalled as a witness on behalf of the defendant, testified as follows:

(By Mr. COLBY.)

Q. I want to know, Mr. Robbins, if the plaintiff company ever made any efforts to get you to ship ore through them.

Mr. GRAY.—I object to that as wholly immaterial.

Mr. COLBY.—I think it is material in a way.

The COURT.—It may be, but I don't see the materiality just now. It may go in.

A. Repeated efforts.

Q. They made repeated efforts? A. Yes, sir.

Q. You were shipping in the early stages to another smelter, I understand. A. Yes, sir.

Q. Did any overtures ever come to you from any representatives of the plaintiff company to lease your property to them?

A. Yes, sir; Mr. Bailey asked me if I would not lease it.

Q. He asked you if you would not lease the property to the plaintiff company?

A. To the plaintiff company.

Q. And what was your reply?

(Testimony of Charles P. Robbins.)

A. I told him I would think it over, but I never gave [399] him any answer.

Q. That was about when?

A. Some time in 1918.

Q. That was a year prior to the date the suit was brought? A. Yes, sir.

Q. If the plaintiff should prevail in this suit in its contentions, what effect would it have upon your company?

Mr. GRAY.—I certainly object to that.

Mr. COLBY.—I want to show the amount of ore that would be taken. In fact, that they would have no mine left, practically.

The COURT.—I think that is conceded, is it not?

Mr. GRAY.—I think they would have some left, but I don't think it makes any difference.

The COURT.—The result is immaterial.

Mr. COLBY.—Of course it makes no difference, I appreciate that; that whatever the hardship may be, if the law is against us we have to suffer the consequences, that is true.

The COURT.—Yes.

Mr. COLBY.—That is all.

Mr. GRAY.—My understanding is if the law is against you there is no hardship.

Witness excused. [400]

Testimony of Philip Creasor, for Defendant.

PHILIP CREASOR, called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. COLBY.)

Q. Your name is what? A. Philip Creasor.

(Testimony of Philip Creasor.)

Q. Where do you reside?

A. I reside in Spokane.

Q. How long have you resided here?

A. Why, I have been here since last November, but my family has been here for some years.

Q. And where did you reside prior to that time?

A. In Republic, Washington.

Q. And how many years did you spend in Republic?

A. Why, six years that I was up there steady.

Q. And when did you go to Republic first?

A. I went to Republic—that is, first to the country in 1896, on the 28th day of February.

Q. And why did you go there?

A. I went there to prospect.

Q. And who sent you there?

A. Mr. James Clark and Charles P. Robbins from Rossland, B. C.

Q. Why was it you went over to Republic at that particular time?

A. Why, just because the reservation was thrown open, and Mr. Ryan claimed that he knew of some prospects there in that vicinity in some place that might be pretty good [401] prospects towards mines. And we went over to prospect to see what we could find.

Q. Where did you camp when you got over there?

A. We got there on the 27th, down on the San Poil creek just right down about southeast of Republic, known as Republic now.

Q. Was the town of Republic there at that time?

(Testimony of Philip Creasor.)

A. No, there wasn't anybody living there at all. This was down on an Indian ranch, Batiste's Indian ranch.

Q. That was wild country at that time?

A. Yes, there was nothing there but the Indians, half breeds, etc.

Q. It had been just thrown open?

A. Yes, it had just been thrown open. It was thrown open on the 22d of February at 12 o'clock.

Q. At midnight?

A. At midnight. And we got in there the night of the 27th, from Rosland.

Q. Did you meet any white people in there?

A. Well, not in there at that time. We met Mr. Welty Brothers, two brothers, we met them at Danville, now, and it was then called Nelson.

Q. What was the name of the place?

A. Nelson, it was at that time, but now it is called Danville. It is right on the boundary line.

Q. What are the names of the Welty boys?

A. George and John Welty.

Q. John was the man who testified here the other day? [402]

Q. You are familiar, are you not, with the Lone Pine location? A. Yes. I ought to be.

Q. You were one of the locators?

A. I located it, yes.

Q. Will you tell the Court just how you located it, what happened on that particular day, starting from your camp? What day was it, in the first place, do you recall?

(Testimony of Philip Creasor.)

A. When we went up and located it, it was the 28th day of February, 1896.

Q. Now, just tell the Court what you did on that day.

A. Well, we left camp in the morning, Mr. Ryan and I alone, and the Welty boys, we left them in camp, and we went up west, in a westerly direction from camp, right through and up a little west we struck what is known as the Sherman trail at that time. It went right across the upper part of Republic town, right where the courthouse is now. And then we went up through the old town, that is west, kept on west, and when we got up there, we saw the hills that were up ahead of us different directions, and one particular hill looked pretty high, and we thought we could get a pretty good observation from it of the country, as we had never seen it before, and it has since been called the Flag Hill. So we made for that and left the trail. We crossed the creek at what is known now as the old town and kept on in a westerly direction and right up the hill until we came up near where to this Flag Hill was, and we run across a little ledge, about 2 feet wide, of quartz, and I thought I saw a little copper stain in it, and we located it and called it the Copper Bell. And Ryan he [403] left me to stake it and write the notice and post it up, and he went ahead, straight on up to this Flag Hill, and he went around to the other side of it, and he found a ledge there of quartz, and he came back and told me to get through as quick as I could, that there was a good ledge up there, a good deal better

(Testimony of Philip Creasor.)

on. So we went up then together, and we cut a stake there, it was quite a prominent vein there, looking good, lots of iron stain in it, and we located it, cut off a little tree and wrote out a notice on paper and posted on it. And just then at that time, we saw two or three men coming up on horseback towards us, and we waited until they come up, and it was Half Breed Joe LeFluer and some other parties, and George Reynolds, I believe was one of them, and I forget who the third man was, and we asked them about these veins, if there was anything in them, and they told us the Government surveyors, when they went through there, they told them that they got five dollars in gold. So we thought that was pretty good. We kept on then, up north, and when we got over a little further, we run across a claim that was located and called the San Poil, and in looking across to the northeast, we saw three mountains, like three small mountains, that kind of sets off from the other high ranges, and I says, "It looks like them hills, there maybe ought to be a mine in them, they seem kind of mineralized looking." And he said, "Well, let us go across and see." [404] The creek was between us and what is known as the Black Tail here and the Lone Pine.

Q. That is Eureka gulch you are speaking about?

A. Yes, sir.

Q. That runs right down by the Lone Pine and Black Tail and on towards Republic?

A. Yes. And so we decided that we were to divide there and one of us were to go down what is known

(Testimony of Philip Creasor.)

now and get upon a point, as the Black Tail here; and Mr. Ryan started that way.

Q. Now, I will ask you to point out on the model here, since you have reached the ground in controversy?

A. We were over here like this, from this draw. This is the draw between the Black Tail here and the Lone Pine here—that is, known as that now.

Q. And this draw extends down this way?

A. This draw was going right down this way.

Q. What is the name of that draw?

A. Eureka. And we were up here on these other hills, on the San Poil, so we decided that Ryan would go down and go across and up on this side and I was to go around here on what we call a little cove.

Q. Little cove?

A. Yes, sort of a valley, and go up this little flat and come back on this hill. And that is the way we went. He went up that way and I came right around here and came on just about the center of the hill and there was a long point running up like this, there was no snow on that much. I was making where I could get up there without any trouble. [405] The snow was in the woods and down in the valley; on the north side there was about a foot and a half of snow. So I went around this way and came up right in this direction and when I got over to the hill somewhere we will say in here some place, I ran across a lot of float quartz—looked like float. I looked around and couldn't see no bedrock only just big boulders of quartz in there, so I kept on *til* over here. When I

(Testimony of Philip Creasor.)

got over here I found different ledges, small ledges, and I looked around there and I went on down a little more to the point of the hill and I saw another little ledge or two; and at that time when I looked over I heard something and I looked across over in this direction and Ryan was over there calling me. I noticed that it was him but I couldn't tell just what he said but I knowed by his motions that he wanted me to go over there. So I went to work—there was a little pine tree close to where this ledge is here, a little small tree 5 or 6 inches through, so I cut it down about 5 feet high and squared the top and wrote the description of the claim, describing it, and then I started down. When I got that done I went down, instead of climbing across here—the snow was very deep—I kept this way right here, right across here where the hill was lower, and then went back on kind of a level country bench there, right back to where Ryan was; and when I got where he was the two Weltys boys, and Ryan, they explained to me that they thought there was a vein where we was there, that the Weltys had it located, and had cut the stake down and was figuring on [406] moving the reservation—

Q. The location?

A. The location and whether—to a ledge he said was over the hill. And he broke his axe and they couldn't get stakes, and I found out that was what Ryan was calling me for, to get the axe, but it was getting dark then and we decided not to do anything more. So we all went down to camp together. And

(Testimony of Philip Creasor.)

the next morning, then, why, I wrote this notice out for the Lone Pine, just the way I described it, on paper, and took it back with us and then I located—

Q. So that the Judge will understand, you wrote the notice, your own notice on it, you say, in pencil?

A. Yes, sir, in pencil.

Q. And the next day the notice that you took over there was a paper notice?

A. Was a paper notice in regular form, you know, and filled out with the description the same as I had on the post. I also then wrote the description and located this Last Chance, and they told me that this place here where we put the notice was the identical place where Mr. Welty's notice was.

Q. That is on the Last Chance?

A. Yes, sir; on the Last Chance. The Black Tail notice was right on this ledge in the identical same place.

Q. In order that we do not confuse these notices, the Black Tail notice was originally at the discovery of the [407] Last Chance?

Mr. GRAY.—That is what he says they told him. He does not know.

Mr. COLBY.—Yes, sir.

A. So I wrote out the notice and put it up there, and Mr. Welty wrote his notice, and he signed mine as a witness and I signed his, and he took his down and put it wherever he wanted it. I did not go to see where it was at that time.

Q. That was his Black Tail notice?

A. Yes, sir; that was his Black Tail notice, where

(Testimony of Philip Creasor.)

the notice is now as there discovered. And I went back up over to the Pine around this way because there was deep snow down below the gulch.

Q. How was it in this gulch at that time,—was there any timber there in the gulches?

A. Well, there was a little timber, but not very much, about the same as there is now, that is, in the gulch between the Pine and the Black Tail.

Q. How was it on the Eureka gulch?

A. The Eureka gulch was heavily timbered all the way through.

Q. There was a great deal more timber in that country at that time than there is now?

A. Oh, the timber is nearly all cut down now, but we had to go through the timber until we came down to where we were here and then go up again and we went and posted our [408] notices and I came back down again and over to the hill, and we went and put up the stakes, the corner stake of the Pine and the corner stake of the Black Tail both together. He asked me where I was going to put my stake. Well, I says, "You put yours"—and his really in a way had a right to be a prior location—"You had it located before and was just moving it," and I says, "You have a right to put your stakes just wherever you want them, and I will put mine, so when he put his stakes I went in with him and I helped him to do it, and I says, "That is just as near as I can see what would be all right for my claim, and I will put my stake here, too," and we done so until we got down to the lower corner. That would be the southwest

(Testimony of Philip Creasor.)

corner, down in the gulch, down at the point of the hill down here. And we cut a tree down there and he took the stump for a post and I took the next one and framed it up and cut it and he went on, and I says, "I want to put mine a little farther over." I saw the line was crooked and was going to leave a fraction in there, so I took mine over and put it down in the gulch, down in here so it would come on the line where it is now. It was this corner that was moved in afterwards by a surveyor, and I put it down in there. And then I went back up the hill again and put the other stakes up. Ryan and I went back to the other end, the stake south of me.

Q. The stake at which end?

A. Over to the north end I would say instead of the south. [409]

Q. Yes.

A. And by the time we got that done it was night and we went back to camp again.

Q. Now, as I understand you, you came on what you afterwards located as the Lone Pine from the north end?

A. From the north end, came right in from the north end.

Q. And you first saw what you thought was this float rock?

A. Yes, sir, what is known as the blowout.

Q. What is known as the blowout, in the vicinity of this little tunnel here that is marked 13C?

A. Yes, sir.

Q. And why did you place the discovery or make

(Testimony of Philip Creasor.)

the discovery at this point that you have testified to as being a little pine tree here, why did you put it there?

A. Well, because there was a prominent little ledge there in place and I saw two or three or four ledges and they were prominent in place and seemed to be solid bedrock. There was no float about it and I thought if I would locate with the hill, why it would catch all these veins, I would have 600 feet of the vein anyway, and if I wanted more ground I could locate on each side, and so I put the location right through in a northerly and southerly direction so it would catch all the veins.

Q. Did you at that time actually know which way the veins ran?

A. Yes, sir, certainly, they showed as plain as anything [410] could be, every one of them, at the top of the hill.

Q. How was it with this No. 2 vein,—did you find the No. 2 vein at that time?

A. No, I did not know anything of it at that time. I did not go down that way. It was all grown with grass and smooth and you could not see bedrock, and it was getting kind of a little dusk; it was after sundown then.

Q. I understand Mr. Welty was not with you that day?

A. No, I never saw Mr. Welty until I got over where he was on the—

Q. On the Black Tail hill there?

A. Yes, sir; where Ryan was.

(Testimony of Philip Creasor.)

Q. That was in the evening?

A. That was in the evening just about dusk.

Q. And after you had made your discovery here on the Lone Pine?

A. Yes, sir; after I had located this and went around this way and went down to where they were.

Q. You are familiar with this No. 2 Lone Pine vein, are you not? A. Yes, sir; fairly.

Q. You have mined in the vein?

A. I have worked in it and mined in it.

Q. When did you first gain any knowledge that there was a vein like that there?

A. It was the 6th of March.

Q. Why do you know that it was the 6th of March?
[411]

A. Well, because the 29th we located the Last Chance and the next morning it was the first day of March; it was a very cold day and Ryan did not want to go out, so I went out alone, and went right across to where the main town of Republic is right down on Granite street and went up the next hill, I intended to go to what is known now as the Republic hill.

Mr. GRAY.—I think that these wanderings we are not interested in.

Mr. COLBY.—We will shorten this a little.

Q. Did you come up on the Lone Pine claim until after that, until you had recorded the notice?

A. No—until I recorded it?

Q. Yes, sir. A. No.

Q. How long did it take you to record the notice?

A. I went down to Nelson to record it on the 2d

(Testimony of Philip Creasor.)

and I got back the night of the 4th of March, up to the 10th and found Ryan and he told me he had been over and found a big ledge over on what is known as the Republic hill, so the 5th we went over, got here just at daylight, because there was some other people in camp, and went over and located the Republic and Jim Blaine. That is away south of the camp.

The COURT.—That is not material at all.

Mr. COLBY.—You came up again on this ground on the 6th?

A. On the sixth we came back again to look over the [412] Lone Pine and Last Chance to see whether we could find any more ledges and see what we had, and then we found this No. 2 vein.

Q. When did you do any work on the claim?

A. It was about as near as I can remember, it was two weeks after, because I took the samples, I did not have any pick or tools to work with, I didn't even have any prospecting pick, I broke samples off with a pole and axe, and cut the samples down and took a sample from each place where we found quartz or any ledges that looked good, and went clear back to Nelson, B. C., and took the samples with me to get assays, and they all run a little, and they advised me then, Mr. Robbins and Clark, to go back and gave me more money to go back and get tools and powder and do some work on it, and so we went back and done some, put a cut in each place. We started in on the Republic first—

The COURT.—Never mind the Republic.

Mr. COLBY.—No, don't bother about other claims.

(Testimony of Philip Creasor.)

A. I started in and run a cut in, it would be about as near as I could guess at it; it would be about a month before I got done the work on the Pine; it might be a little less. I run a little cut in right straight down the hill from the top. That would be right about here, I guess, as nearly, as I can guess at it.

Q. On the Lone Pine No. 2 vein?

A. No. 2 vein. I run a little cut in here; just cut across the wash to see how wide it was.

Q. Was there any discovery work required at that time? [413]

A. No. They located under the Government law. They had a year and a fraction to do the work in.

Q. What was the custom in that general district about posting your notice with reference to your discovery?

Mr. GRAY.—No.

Mr. COLBY.—I think that is quite material.

Mr. GRAY.—I object to that.

Mr. COLBY.—I think this witness from what he has told about his locating and his experience as a prospector knows about this general custom.

Mr. GRAY.—He seems to have made the custom; he got in there about the first day. There were no rules.

The COURT.—There were no mining rules there.

Mr. COLBY.—That may be so.

The COURT.—I do not see the materialty of anything except what he did.

Mr. COLBY.—It is merely to show—

(Testimony of Philip Creasor.)

Mr. GRAY.—Oh, well, if you think it is material, Mr. Colby, put it in.

Mr. COLBY.—Q. Do you know whether there was a general custom among miners to post a notice near the point of discovery?

A. No, I don't know whether there is any. As long as the post is near to the discovery spot as reasonably possible as could be, and this one was about as near as I could remember, was about 10 feet from it, and I suppose that is close enough, because I cut this tree off and did not bother to make a regular post. [414]

Q. Now, Mr. Creasor, did Mr. Welty ever take you over on the Black Tail hill before you made your Lone Pine location, and point out any croppings over here on the Lone Pine hill?

A. No, he could not, because I never saw him.

Q. Never saw him until you made your Lone Pine discovery?

A. Never saw him until after he made the location or went down around there. [415]

Q. Mr. Creasor, you have an interest in this defendant company, haven't you, the Lone Pine Surprise? A. Yes.

Q. You are a stockholder? A. Yes.

Q. And you were one of the locators of the Last Chance claim, were you not? A. Yes.

Q. And, either as an owner or part owner of the Last Chance, and also as an owner of a portion of the stock, you have been interested in that Last Chance ever since? A. Yes, ever since.

(Testimony of Philip Creasor.)

Q. Have you any other interests in Republic now?

A. No.

Q. You lived there how long after you made this Lone Pine location? How long have you been up there?

A. I was there pretty near all the time until about—let's see—to 1906. I left there and I wasn't back up in Republic again until six years ago, I guess, in October, I think it was when I went back there; and I have been back once or twice, but just in the camp and out again.

Q. Did Mr. Welty ever tell you that there was any vacant ground north of his Black Tail location and for you to go and locate it?

A. No, he never told me.

The COURT.—The witness testified he never saw him until after he made the location.

A. I never saw him.

Mr. COLBY.—I wanted to bring out the point that he [416] never did tell him.

Q. Do you know, or did you know where the Black Tail was before you located the Lone Pine?

A. No.

Q. Or, the Black Tail claim, did you know where that was? A. No, I had no idea.

Q. And did you do any work on this Lone Pine claim within a day or two after you made the Lone Pine location?

A. No, not for two weeks; not until after I went to Rossland and back again.

(Testimony of Philip Creasor.)

Cross-examination.

(By Mr. GRAY.)

Q. This man, who was a locator with you, his name is Ryan? A. Yes.

Q. Where is he now?

A. Well, I don't know whether he is in the court-house this morning, or not.

Q. He has been here right along, has he?

A. Yes.

Q. You seem to be quite familiar with the model. You are accustomed to looking at models, are you?

A. No, I ain't.

Q. Now, then, just show the Judge here where the Last Chance claim is here.

A. The Last Chance is right in here.

Q. Where was the discovery? Just point that out on the [417] model.

A. The discovery of the Last Chance?

Q. Yes, on the model, point it out.

A. It was about here, I guess.

Q. About where is it on the model? Just show the Judge with reference to the lines of the claim, where it is on the model.

A. Over in here.

Mr. COLBY.—The Judge will observe the discovery is right below where the witness has pointed on the map.

Mr. GRAY.—Q. Did you make that discovery?

A. Why, no.

Q. Who did? A. Mr. Ryan.

Q. Were you over there?

(Testimony of Philip Creasor.)

A. Yes. I was over there and located it, helped him.

Q. How did you get over that day?

A. I went over from the top of the Pine.

Q. From the top of the Pine?

A. From the top of the Pine discovery.

Q. And what day was that?

A. It was the 28th day of February, 1896.

Q. The same day you located the Pine? A. Yes.

Q. You walked way over around this discovery of what you call the Chance. A. Yes.

Q. Where was Welty at that time?

A. Welty was there when I got there. [418]

Q. Welty was here at this discovery when you got there?

A. Yes, along with Ryan. George Welty was there too. The three of us were there together.

Q. Did you see them over at the discovery of the Black Tail?

A. No, I didn't know there was such a thing as the Black Tail claim.

Q. When did you first find out that he had a claim located? A. When I went over there.

Q. When?

A. I didn't know where it was. I knew they located two claims in the camp some place, but that was when we were away off here, 30 miles from there.

Q. But you went over to the discovery of the Last Chance and when you went over there you didn't know where that claim was?

(Testimony of Philip Creasor.)

A. Not until they told me. I went over there and they told me.

Q. Oh, they told you when you went to the discovery of the Last Chance, where there claim was.

A. Yes, sir.

Q. Then you went to camp did you?

A. Yes, we went to camp that evening.

Q. Without putting up any other stakes?

A. Yes.

Q. You went with Welty? A. Yes.

Q. How did you go to camp? [419] A. Walked.

Q. What way?

A. We went down the gulch. It runs down in a southerly direction.

Q. You went right over past the Welty camp?

A. We were both camped together, right below, down here.

Q. You went right over from the Last Chance, walked right over across the Black Tail, over Eureka creek, didn't you?

A. We just crossed one little corner of the Black Tail.

Q. Which little corner? A. Southeast corner.

Q. Where were you camped?

A. Where were we camped?

Q. Yes.

A. We were camped just about from—do you know where the courthouse is in Republic?

Q. No, with reference to the map.

A. In about a southeasterly direction. [420]

Q. How far?

(Testimony of Philip Creasor.)

A. It will be just about 2 miles.

Q. You and Welty were camped down at the same place? A. Yes, down on Battiste's ranch.

Q. And you had not seen him before you went up that day? Hadn't you seen him at camp that morning?

A. Yes, we were all there together in the morning.

Q. Did you have any talk with him?

A. In the morning?

Q. Yes.

A. Most decidedly.

Q. You knew he had a claim located over in the vicinity of Eureka gulch, didn't you? A. No.

Q. He didn't tell you he had?

A. No, he didn't tell me where or what direction his claim was in.

Q. But you knew he had a claim there some place?

A. I knew he had a claim in camp but didn't know where.

Q. And you say you stood over near at the Lone Pine hill and you saw Ryan calling to you from the Black Tail hill? A. Yes.

Q. Who was with Ryan?

A. I could not see anybody. He came over to the brow of the hill as far as he could where he would not get into the snow and hollered to me as near as he could, because he knew I was a little hard of hearing and couldn't hear [421] very well.

Q. But you heard him across the creek?

A. I heard him, but could not hear what he said?

Q. And then you went over?

(Testimony of Philip Creasor.)

A. I went over as soon as I could.

Q. The next day, I understand, you came and put your stakes in? A. Put up the stakes, yes.

Q. And staked out each corner and at the center of each end line; is that correct? A. Yes.

Q. Were those stakes close to where the patent corners of the Lone Pine now are?

A. Close to the patent corner?

Q. Yes. A. That is, you mean—

Q. Were the patent corners placed near where you put your old—

A. No, they were over quite a ways.

Q. How far?

A. Well, I don't remember. I think that south-east corner must be somewhere maybe 150 feet further to the west, I guess it would be.

Q. Over here in the creek?

A. Yes, down in the creek. It would be on a line, a straight line with that hill. The end-line was not moved.

Q. The what? [422]

A. The end-line was not moved.

Mr. COLBY.—The direction of the end-line?

A. Yes.

Q. The southeast corner was put in the same place that it was patented?

A. Yes, that is the same place.

Q. Now, where was your center end stake then, do you remember?

A. Why, it was just as near as we could, about 300 feet from the southeast corner.

(Testimony of Philip Creasor.)

Q. Of course you saw those croppings on the Black Tail, didn't you?

A. No, not at that time, not until afterwards.

Q. Not until the 29th, when you put your corner stake in there in the middle of that line?

A. No, sir.

Q. You did not see those croppings?

A. No, sir, we did not go that way.

Q. How did you get to the center end stake of the Lone Pine?

A. We went right down from the discovery of the Chance, right down to the corner of the Pine.

Q. Which corner?

A. To the southeast corner, and then went straight down on a line down that way.

Q. And what stake did you put in first?

A. The center stake.

Q. And then you put in that southwest stake?
[423]

A. Then put in the corner.

Q. And you could not see those croppings on the Pine—on the Black Tail, from that center stake?

A. No.

Mr. COLBY.—Of course you could not.

Mr. GRAY.—Now, Mr. Colby.

A. No, I could not do it.

Q. Did you see the croppings on what we call the Lone Pine vein near Station 545 on either of those days?

A. No. I saw the croppings, but I could not tell what they were.

(Testimony of Philip Creasor.)

Q. But you saw the croppings?

A. I saw the side of the hill, but I didn't know; I had no idea there was a ledge on it.

Q. As far down the Lone Pine as you came to the south, according to your story, is the point where you posted the notice?

A. I came just about to maybe 50 or 60 feet further to the south than the discovery post was put.

Q. Did you find any more veins on the way down?

A. Yes, there was another little vein or two in there.

Q. Did you look down the hill to the south?

A. Yes.

Q. You could see those croppings over there, couldn't you?

A. No, I could not see it over there.

Q. You did not see it until the 29th? [424]

A. I did not see it until the 29th. Well, I didn't see the ledge until the 6th, to know that it was a ledge.

Q. I know, but you saw the croppings standing out of the ground on the 29th?

A. I saw rock, but I didn't know what it was.

Q. It was standing up prominently above the surrounding rocks?

A. Part of it was standing pretty well.

Q. And that is about at this point 545 at the west end of that open stope; is that correct? That is where they were?

A. Yes, that is possibly the highest point.

Q. And the first work you did on the claim you did at that point? A. Right there; yes.

(Testimony of Philip Creasor.)

Q. When did you afterwards open up that little trench near the point where you marked the discovery? A. When did I cut it, you say?

Q. Yes. A. Why, I didn't cut it myself.

Q. When was that done?

A. Why, I believe it was cut the next year.

Q. The next year? A. Yes.

Q. Now, you said up at the north end of the claim you found what you called blowout croppings of the vein?

A. Not clear down to the north end.

Q. Up near the north end? A. Yes. [425]

Q. Was it your opinion from what you saw at that time that these veins ran in an easterly and westerly direction? A. Yes.

Q. How did you come to locate this claim in a northerly and southerly direction?

A. So as I would take all the veins in and all the quartz that was in sight and on the top of this ridge.

Q. Mr. Creasor, had you located mining claims prior to that time? A. Yes, sir.

Q. Been a prospector? A. Yes, sir.

Q. Where had you prospected?

A. I had prospected in California, Nevada—not Nevada—Yes Nevada, and Washington, British Columbia, Michigan, Minnesota.

Q. You had had a long experience as a miner and a prospector? A. Yes.

Q. You were familiar with the location of mining claims by prospectors? A. Yes.

Q. And yet you say that you located across these

(Testimony of Philip Creasor.)

veins instead of along the vein that you discovered?

A. Yes.

Q. You knew, of course, that the mining law gave you the right to locate 1500 feet along any ledge that you discovered, didn't you? [426]

A. Yes.

Q. And 300 feet on each side of the center?

A. Yes.

Q. You yourself wrote the location notice in which you claimed the 1,500 feet along the ledge which you had found on that claim?

A. Yes, that is what I claimed on the notice.

Q. And you asserted in that notice that it ran in a northeasterly and southwesterly direction, didn't you? A. Well, I don't know.

Q. Didn't you allege that you had run 1,500 linear feet on this ledge, in your location notice?

A. Well, described it that way.

Q. Now, you want the Judge to understand that you did not think you were locating 1,500 feet along that ledge; is that it?

A. Well, I knew I was not right along the ledge.

Q. Didn't you think you were locating the ledge which ran lengthwise of that claim? A. No.

Q. You thought you were locating one which ran crossways?

A. I thought I was locating maybe dozens of them, or I didn't know how many, that was running crossways of the hill, and it was a hogback hill, and if I was running that way I would take in them all.

(Testimony of Philip Creasor.)

Q. It was your purpose, then, to locate several ledges [427] with this claim?

A. Yes, it was, sure.

Q. Did you attempt to trace out any of these ledges at this time?

A. No, not before I located. Just where I could see.

Q. How far could you see this ledge that you say you found at the point where you marked the discovery?

A. Well, that evening I don't think I saw it any more than 20 or 30 feet, or maybe 50 or so.

Q. In which direction, 50 feet?

A. Why, in a northeast by southwesterly direction.

Q. At the discovery? A. Yes.

Q. In a northeast by southwest direction?

A. Yes.

Q. You say you never were over the lower end of that claim except to stake it until after you had gone and reported your location notice?

A. I didn't catch just what you said.

Q. You were never over any portion of the southern third of the Lone Pine claim—I might say the southern half of the Lone Pine claim, except to put the corner posts and center post, prior to the time you filed your location notice?

A. No. Before I filed it?

Q. Yes.

A. No, only just to put up the posts, that is all.

Q. You were over at the Black Tail discovery

(Testimony of Philip Creasor.)

before [428] you filed your location notice?

A. Yes, before I filed it.

Q. That would be on the 29th?

A. Yes, that would be on the 29th; along in the afternoon, I think it was.

Q. You knew where it was?

A. Yes, I knew where it was then at that time.

Q. And at that time you knew of those croppings of the Black Tail vein on the Black Tail claim?

A. Well, I knew which direction the ledge went where the discovery was.

Q. I say you could see it sticking out of the ground there, couldn't you? A. Yes.

Q. Follow right along them?

A. When you ran down to them you could see them.

Q. Certainly. And you saw those on the 29th?

A. Yes, the 29th.

Q. And, of course, on that day you took a look at that mine over on the other side of the hill?

A. Well, I likely took a look over, but that is all you could see. You could not see anything but rocks sticking out.

Q. Rocks sticking out all over?

A. Yes, very near everywhere on the south side of the hill. You could not tell one from another.
[429]

Redirect Examination.

(By Mr. COLBY.)

Q. How did those rocks look that were sticking out of the hill?

(Testimony of Philip Creasor.)

A. Why, I could not see any difference at a distance, whether it was poor rock or whether it was quartz, or what it was, because it showed kind of rusty color, all alike, you might say, kind of mossy.

Q. Those rocks along here on the outcrop of the Lone Pine were indistinguishable from the country rock from a distance, weren't they?

A. Yes, you could not tell them from the country rock at a distance.

Q. Mossy?

A. Yes. Except you knew it. If you knew them you could see a distinction, but just to come along and look at the hillside a man could not tell. You could not tell it from country rock. I was right on the ledge crossing it before I saw it to know that it was a ledge.

Q. The Lone Pine No. 2? A. Yes.

Q. Now, Mr. Creasor, you have mined on that Lone Pine Ledge No. 2 for quite a while, haven't you? A. Yes.

Q. Where, in your opinion, is the southwesterly extension of that ledge?

A. The southwesterly section?

Q. The southwestern extension of that ledge.

[430] A. Where does it go?

Q. Yes.

A. Well, I believe it goes right down almost to the Pearl vein.

Q. The Pearl vein is this vein marked in yellow here? A. Yes, right over there.

Q. On Exhibit 26? A. Yes.

(Testimony of Philip Creasor.)

Q. And it is marked as the Surprise vein?

A. Yes, crosses near the corner and back to the railroad cut.

Q. Is that the same vein as the Surprise vein?

A. Well, that is what I believe, and always did.

Recross-examination.

(By Mr. GRAY.)

Q. Look here; why didn't you follow it down there when you were mining? Why didn't you follow that vein over there?

A. Follow that vein over to that railroad cut?

Q. Yes.

A. Well, it only came in there, showed on the surface in stringers, little stringers that ran down after the railroad was built down there, little stringers that ran down, kind of forming a wall of ledge matter, running down through that.

Q. I say, why didn't you follow this vein over here, if you had it continuing when you were mining upon it?

A. Well, because it didn't show anything to justify it. [431]

Q. You didn't find anything to justify you in following it; is that it?

A. Why, no, except that there was something to work on; it was small.

Q. And you didn't find anything to work on over there?

A. No, it didn't look like it justified working.

Q. Is that Mr. Ryan sitting back there, one of your colocators? A. Yes.

(Testimony of Robert M. Anderson.)

Q. He is still interested in this company, too, isn't he? A. Yes.

Witness excused. [432]

Testimony of Robert M. Anderson, for Defendant.

ROBERT M. ANDERSON, called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLBY.)

Q. Mr. Anderson, what is your full name?

A. Robert M. Anderson.

Q. And where do you reside?

A. At Roundup, Montana, at the present time.

Q. And what is your occupation? A. Miner.

Q. How long have you been mining?

A. About 30 years.

Q. And what sort of mining have you done in that time? A. All kinds of mining.

Q. You have mined in what places?

A. Well, I have mined in the principal mines of Montana; mined in Idaho and Washington, Nevada and California.

Q. Have you had any experience up in Republic?

A. Yes, sir.

Q. Are you familiar with the Lone Pine location?

A. Yes, sir.

Q. I will ask you to come to the model here. You are familiar with the Lone Pine vein No. 2?

A. Yes, sir; I have worked on it a number of times.

(Testimony of Robert M. Anderson.)

Q. On different occasions? A. Yes. [433]

Q. You are familiar with what is called the No. 4 vein? A. Yes, sir.

Q. Have you mined in there? A. Yes, sir.

Q. Did you mine while they were taking ore out of the No. 4 vein? A. Yes, sir.

Q. Point out to his Honor what work you did in the No. 4.

A. I worked in a small stope about here. Here is the main vein. That splits and runs this way.

Q. That work was a little turn just to the northwest of stope 133-C, at the extreme end of the workings? A. Yes, sir.

Q. Now, on the Lone Pine No. 2 vein; have you examined that? A. Yes.

Q. Do you know its characteristics?

A. Yes, I have worked all over it almost.

Q. Now, have you examined this ground with the idea of finding an extension of the Lone Pine No. 2 vein in a southwesterly direction, if there is one?

A. I never did, until lately.

Q. You have done that lately? A. Yes.

Q. You have gone over the ground with the idea of finding the facts, as far as you could find them?

A. Yes.

Q. Where, in your opinion, is the extension of the Lone Pine No. 2 vein, beyond this big stope going southwesterly [434] or southerly?

A. Well, there is quartz here that might be—I wouldn't say it is, because it is not connected up in the gulch.

(Testimony of Robert M. Anderson.)

Q. Why do you think it might be?

A. Well, I don't know any other place for it to come from. It is the same character of ore as the No. 2 vein.

Q. And what is its strike and dip with reference to the No. 2?

A. Just about the same, as far as I can see. Isn't opened up very well.

Q. In your opinion, then, as a practical miner, that would be the probable extension of the No. 2 vein? A. Yes.

Mr. GRAY.—These are rather leading, Mr. Colby. He said it might be.

Mr. COLBY.—He said it might be and expressed that as his opinion. I am simply following up the testimony he had already given. I sometimes fall into the error of using leading questions, but I notice opposing counsel is not entirely above that same error. I didn't call his attention to it several times, because I thought we were getting along pretty well in the course of this examination. That is all.

Cross-examination.

(By Mr. GRAY.)

Q. Now, Mr. Anderson, you say it has the same character ore *ore*, as the No. 2 vein?

A. Well, as near as I can tell. [435]

Q. Well, have you been over in any of the workings over in the Black Tail?

A. I never did any work in the Black Tail; no.

(Testimony of Robert M. Anderson.)

Q. I didn't ask you that. Have you been over in any of these workings?

A. I was through them; yes.

Q. That is the same character of ore, too, isn't it?

A. No, I don't think it is.

Q. Different? A. A little softer; softer ore.

Q. Is the quartz softer?

A. Yes, sir.

Q. You think, then, there is a difference between the ore in the Black Tail vein and the ore in what you call the Lone Pine No. 2 vein?

A. Looks more like what we call sugar quartz; softer.

Q. More like sugar quartz and softer? A. Yes.

Q. Did you point that distinction out to any of these distinguished geologists, show them the difference in the character of the ore? A. No.

Q. You went over it with them?

A. I did not.

Q. Didn't you, with Mr. Lakes, or Mr. Burch or Mr. Wiley?

A. They were in there at the same time, but I wasn't with them.

Q. You were all in together, but you wasn't with them? [436] A. No.

Q. You didn't show them that difference then?

A. No.

Q. Whereabouts did you see this sugar quartz in the Black Tail? By "sugar quartz," what do you mean?

A. Well, I mean quartz that breaks up fine.

(Testimony of Robert M. Anderson.)

Q. If you put a shot in the ore in this Black Tail vein it breaks up finer than if it is put in the Pine, you think? A. Yes, sir.

Q. Where did you observe this?

A. I have seen—I have worked right at the Black Tail different times; I have seen the ore coming out of there.

Q. I thought you said you never worked there.

A. I never worked there. I worked in the Surprise just below that.

Q. You worked in the Surprise? A. Yes.

Q. Well, how is that ore? Is that sugar quartz over in the Surprise, too?

A. It is softer; softer character of quartz; yes, sir.

Q. You have examined these surface trenches, haven't you? A. Yes.

Q. Let's get over to the map. You have examined this one down through here? A. Yes, sir.

Q. Marked "Cut" at 108-C? A. Yes.

Q. Is there any difference in the quartz there and the [437] quartz in these points 9474, 9475, and 9476?

A. In those cuts I couldn't find anything but stringers.

Q. In 108-C, you say in there there is nothing but stringers?

A. That is all I could see.

Q. There is quartz there, isn't there?

A. There is quartz there; yes, sir.

Q. Is it different in character from the quartz

(Testimony of Robert M. Anderson.)

you find in **the** stopes near the southwest corner of the Pine claim? A. Well, it is—

Q. Yes, or no.

A. No, I don't think there is any difference there.

Q. Is it different from the quartz which you find in this trench up at 558, that cut there?

A. This quartz here and this?

Q. Yes, on the two sides of the gulch, isn't there a difference in the quartz? A. I don't think so.

Q. And you have been down that trench from the open stope, haven't you? A. Yes, sir.

Q. Is there any difference in this quartz and the quartz on the other side of the creek, in the cut?

A. It is a different color, that is all.

Q. Different color? A. Yes, sir.

Q. This is yellow, and the other is red?

A. Blue here, quartz.

Q. One is blue quartz, and the other is yellow quartz? You [438] think the Judge, if he goes up there, can identify this over on the north side of the creek as being blue quartz and this on the south side as yellow quartz? Is that the reason they have had it marked yellow on the map, do you suppose? A. I can't say.

Q. Let us go up here. You say you have worked in this Pine a good deal? A. Yes.

Q. Did you work there when they ran out on this working to the south from these stopes?

A. Yes, I leased in there.

Q. You leased in there? A. Yes.

Q. And you followed out from the stopes and

(Testimony of Robert M. Anderson.)

around back again; is that correct?

A. Yes, this vein comes up this way on the wall.

Q. And bends around?

A. It comes up there and about that degree, perfectly flat? Q. Dips easterly, doesn't it?

A. Why, it,—

Q. No,—

A. It goes right back to the other vein.

Q. Dips easterly, doesn't it?

A. Northeast.

Q. I suppose if a little winze had been sunk out there before that turn had been made, you would have thought that vein dipped easterly on strike, northeast and southwest [439] that is the way it looked? A. It does there.

Q. That is the way it looked in the ground to you, I suppose, didn't it?

A. There are four distinct veins right there, stringers as we call it. They come out of one vein and they go right around—it is a big body of ore with horses in it; that is what we call it,—geologists call it a vein.

Q. You didn't figure it went back to a connection on the easterly side? A. Yes, sir.

Q. Whereabouts? A. Just above the 200 level.

Q. That is here? A. Yes, sir.

Q. That is where it unites with that vein. But on its strike it didn't come back up, did it?

The COURT.—Have you ever followed it to find out whether it came back?

A. It comes back, down to the bottom end.

(Testimony of Roy H. Clark.)

Mr. GRAY.—You mean out here?

A. No, that has never been worked clear out.

Witness excused. [440]

Testimony of Roy H. Clark, for Defendant.

ROY H. CLARK, a witness called on behalf of the defendant, after being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLBY.)

Q. What is your full name? A. Roy H. Clark.

Q. And your residence?

A. Spokane,—now. Really in California this winter.

Q. You are temporarily in California? A. Yes.

Q. What is your occupation?

A. Mining engineer and manager or superintendent of mines.

Q. What is your education?

A. I went to the University of California and took the mining course.

Q. What has been your experience in your profession?

A. Well, I have been a surveyor, assayer and superintendent; superintendent of the LeRoy, Josie, I. X. L., in Rossland Camp, practiced as mining engineer in Spokane, I suppose 7 or 8 years; engineer for the Bunker Hill & Sullivan two or three years; field engineer for the United States Smelting Company for about 4 years, and I have been manager of a copper property in Oregon, about 2 years, and I

(Testimony of Roy H. Clark.)

am now superintendent of a magnesite property in California.

Q. How many years has this experience covered?

A. About 25 years.

Q. Have you had any experience in the Republic camp? [441]

A. I have been up there as surveyor and examined properties in the camp; yes.

Q. Are you familiar with the Lone Pine and adjoining claims here in controversy? A. Yes.

Q. I will ask you to come to the model, and ask you if you have examined these various exposures, of the exposures in the vicinity represented by this model, and with the idea of finding out what there is there, from an engineer's standpoint?

A. I have.

Q. And by the way, while I think of it, you made a large portion of the surveys upon which these maps and the models are based, did you not?

A. Yes, sir.

Q. Will you explain to his Honor in your own way what you found there, with reference to the No. 2 vein, and any extension or continuation of that vein in a southerly direction either through the Black Tail or any other claim?

A. Well, the vein is a very persistent vein across the claim until we arrive at the point in controversy, where it is intercepted apparently, by a fault, and beyond that fault is a fracture vein containing quartz having the same strike and dip as the No. 2 vein, to the southwest of this fault.

(Testimony of Roy H. Clark.)

Q. Identify that by some number if you will.

A. Well, that is near surface Stations 576, 575 and 574, and I will say that that is a fairly well-defined vein at these points mentioned. [442]

Q. What is the character of the vein that you see there, Mr. Clark, in dimensions and size?

A. At the winze that has been mentioned heretofore it is about 30 inches wide, and going south-westerly it increases in width from that to a maximum where I measured it of about 6 feet of what would be termed ore in this camp. And from there it narrows down to a small seam, but can be followed right to the railroad cut. It crosses the west side-line of the Lone Pine claim.

Q. What else leads you to believe that it is a continuation of the No. 2 vein? What is its strike?

A. The strike is about 33 to 35, from 25 to 35 east.

Q. What is the average strike of the Lone Pine vein?

A. Well, it varies from north 30 to north 45 east or thereabouts.

Q. Did you get any dips of the vein exposed in those cuts?

A. It is rather difficult to get the dip there, but the dips that I got were about in the vicinity of south 50 degrees east, a similar dip to the No. 2 vein to the northeast.

Q. Now, you went through these workings, did you not, that have been run by the plaintiff company extending up the hill into the Black Tail vein?

A. Yes.

(Testimony of Roy H. Clark.)

Q. Or toward the Black Tail claim and toward the Lone Pine southerly end-line? A. Yes. [443]

Q. What did you find exposed in those workings there?

A. Well, there is a vein of quartz there that extends from a point about 10 feet north of 557 in a southeasterly direction to a point probably 10 feet beyond 108-C and the quartz there varies in width from 2 to 4 feet, from that point about 10 feet north of 557 to a point about 10 feet south of 108-C.

Q. And as you come further in these trenches southerly what do you find?

A. The trench to the east, there is little bunches of quartz until you get to the mouth of that trench, and from the mouth in it is gravel wash and no veins showing.

Q. And in the westerly trench?

A. The westerly trench, there is a seam and bunches of quartz—there is just simply small bunches of quartz and wash right out to the end-line.

Q. Is there anything comparable to the vein that you found farther down? A. No, there is not.

Q. That you have described before? A. No.

Q. How about this little tunnel that runs underground there, what do you find in that?

A. Well, there is a little stringer of quartz that runs in there a short distance. It is cut off pretty well to the mouth of that tunnel, right in right at the portal of that little tunnel, underneath near the surface, it is [444] cut off, and in the face of that tunnel there are two little streaks of quartz I suppose half an inch or an inch wide that lay very flat.

(Testimony of Roy H. Clark.)

Q. Have they the direction of that vein that you describe further down?

A. By stretching your imagination you might say they had the same trend, but it was such a small exposure and they are so minute, it would be very difficult.

Q. Are they any different from the exposures of quartz that you find through the country rock in many places? A. No.

Q. In your opinion is the Lone Pine No. 2 vein an extension of the Black Tail vein? A. No.

Q. Have you examined the No. 4 vein?

A. I have not examined the No. 4 vein very thoroughly except to survey.

Q. You have surveyed those workings there that are on that vein? A. Yes, sir.

Q. Has there been any stoping done in there?

A. Yes.

Q. Now, you have been up here at what is marked on this model as Lone Pine discovery, have you?

A. Yes, sir.

Q. What do you see at that point or in that vicinity? [445]

A. There is a well-defined vein in the discovery cut probably 24 inches wide, and it can be followed continuously in my judgment to the west side-line of the Lone Pine claim.

Q. And how about its persistency to the east, towards the east side-line?

A. It can be followed probably halfway down the hill without any difficulty—it can be followed and it

(Testimony of Roy H. Clark.)

has good walls, that is, you can find the fractures even where—there are points there where the quartz is broken up more or less, that is, what we call vein quartz, but you can follow the fracture planes all the way across to the east side-line.

Q. There is one point here that I wish to call to your attention, and that is out at the end of this curve on the level that has been run out from the winze that has been referred to as the gulch winze. Have you seen any exposure of quartz at the face of that?

A. Yes, sir; there was an exposure of quartz in the face of that near the floor when I last visited that place.

Q. When did you see that face last?

A. It was last Saturday.

Q. The 21st? A. Yes, sir.

Q. And what was the appearance of that quartz that you saw in that face?

A. That quartz dipped to the southeast and I should say about 50 degrees and had a strike of about south 25 west. [446]

Q. And conformed substantially with the Lone Pine in strike and dip and the Lone Pine vein?

A. Yes, sir.

Mr. COLBY.—I think that is all.

Cross-examination.

(By Mr. GRAY.)

Mr. Clark, when were these cuts here at the southwest corner of the Pine first put in?

A. They were put in prior to my last visit to the

(Testimony of Roy H. Clark.)

property, some time; I don't know.

Q. When was that?

A. I visited the property again, I think I arrived there Tuesday night of last week.

Q. Had any of them been put in when you left previously? A. No.

Q. When was it that you left there before?

A. The first of October, 1919.

Q. And your investigations were prior to that except from last Tuesday? A. Yes, sir.

Q. You had studied this ground at that time for the purpose of ascertaining what the relations were between the veins that you found there?

A. Yes, sir.

Q. You had no idea at that time of any theory of a vein going out in the direction of those cuts?

A. Yes, sir; I did. [447]

Q. Did you direct any work to be done for the purpose of ascertaining that fact?

A. Well, I rather advised it; yes, sir.

Q. But it was not done?

A. It was not done before I left. It was done afterwards.

Q. And when you do not know?

A. No, I do not know.

Mr. COLBY.—When did you leave?

Mr. GRAY.—The first of October.

The WITNESS.—In 1919.

Mr. COLBY.—I think the reason was, Mr. Gray, that you would not give us permission, or we would have done that work before.

Mr. GRAY.—No, Mr. Colby. I will have to call

(Testimony of Roy H. Clark.)

somebody on that. I gave you permission to do all the work you wanted to do.

Mr. COLBY.—Yes, but I mean at that time.

Mr. GRAY.—I gave you permission to do all the work you ever asked for.

Mr. COLBY.—Mr. Wiley was the one who wanted that work done, and some three months after we wanted it done we got permission to do it.

Mr. GRAY.—When was that, last spring?

Mr. COLBY.—That was some time last spring.

Mr. GRAY.—Then *if* it is understood that last spring they had permission to do this work as early as February.

Mr. COLBY.—And they made those cuts in there at that time. [448]

Mr. GRAY.—Then I assume you had time enough to develop anything you wanted to.

Q. Now, this vein that is marked in yellow on the south side of the gulch, there is no question in your mind that that is the Black Tail vein?

A. Yes, sir; there is quite a question. I think it is quite possible it is not.

Q. But you have reached—

A. No, I have not reached any conclusion about it.

Q. You are not willing to say that what Mr. Burch and Mr. Lakes have identified in the end of 108-C is the Black Tail vein? A. No.

Q. Where is the Black Tail vein?

A. I think it petered out before it got that far.

Q. So you do not think it reached that far?

A. No.

(Testimony of William Pierce.)

Mr. GRAY.—I think that is all.

Witness excused. [449]

Testimony of William Pierce, for Defendant.

WILLIAM PIERCE, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. COLBY.)

Q. What is your full name?

A. William Pierce.

Q. What is your residence? A. Republic.

Q. What is your occupation? A. Miner.

Q. Have you mined any on the Lone Pine claim?

A. Yes, sir.

Q. I call your attention to the model here—I might state I am not calling Mr. Pierce as a practical witness, but merely to identify one proposition. I call your attention to this little winze colored yellow in the Lone Pine No. 2 tunnel, near point marked "Station 64." Do you know anything about a winze that is there?

A. Yes, sir; I was superintendent and had this work done.

Q. What showed in that work at that particular point?

A. There is ore there that will run 15 to 18 dollars a ton.

Q. What was the width of the vein there, shown in that winze?

A. As near as I can remember, we had a power drill in there, a one-man drill, and we broke to about

(Testimony of William Pierce.)

30 inches with it, as near as I can remember.

A. And how deep did that winze go?

A. Well, about 12 or fifteen feet, somewhere in that neighborhood. [450]

Q. And that that you were breaking 30 inches wide, that was vein, was it?

A. Yes, quartz.

Q. And did that extend into the wall on the side of the winze?

A. Well, it apparently had an eastern dip.

Q. A dip to the east? A. Yes.

Q. And what was the strike?

A. Well, I won't be sure on this, but I think it was northeast and northwesterly, but I would not be positive on that.

Q. It was across the winze anyway?

A. Yes, crosscutting the winze.

Q. How was it with reference to the No. 2 tunnel, which direction did the vein run?

A. Right crossways.

Q. Directly across the tunnel?

A. Yes, practically at right angles.

The COURT.—How far?

A. It is just across the hole.

The COURT.—That is all you know about the vein is what was in that hole?

A. Yes.

Q. The hole is about 15 feet deep?

A. Yes, somewhere in that neighborhood.

Cross-examination.

(By Mr. GRAY.)

Q. Wasn't that ore worth mining? [451]

(Testimony of William Pierce.)

A. What is that?

Q. Wasn't the value of that ore sufficient to justify mining it? A. No, sir.

Q. What was the value of the ore you were mining there at that time?

A. Well, the ore they were mining was the mill feed.

Q. I didn't ask you whether it was mill feed. What did it run?

A. Around about nine or ten dollars.

Q. Around about nine or ten dollars, and it didn't pay you to mine \$15.00 rock?

A. Well, there is a difference in mining ten dollar rock and \$20.00 rock.

Q. I guess that's right. That's all.

Witness excused. [452]

Testimony of Walter H. Wiley, for Plaintiff.

WALTER H. WILEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLBY.)

Q. What is your full name?

A. Walter H. Wiley.

Q. What is your profession?

A. I am a mining engineer.

Q. How long have you practiced that profession? Or I will ask you to state how long you have been engaged in mining first.

A. My first work as a miner was done 40 years

(Testimony of Walter H. Wiley.)

ago. In 1883 I graduated from the Colorado State School of Mines, and since then I have been continuously engaged for a while as an assayer and surveyor and after that as a mining engineer.

Q. What has been your experience? Just briefly narrate where you have conducted your calling and what has been your experience.

A. My work during this time has taken me into much of the western mining sections and has extended into Alaska, into British Columbia and the Yukon territory, into a number of the states of Mexico, into South America and Asia.

Q. Have you made any examination of the Lone Pine and adjoining claims in the Republic mining district? A. I have.

Q. Have you been there on more than one occasion? [453]

A. First in October, 1919, and again in August of 1920.

Q. I will ask you to state to the Court in your own way, as a result of the observations that you made on these trips, the position and existence of any veins in that territory and any of the geological or mining engineering conditions that you found there, and ask you to tell this in your own way to the court.

A. The main veins or the most numerous fissures extend in a northeasterly and southwesterly direction. In addition there are two very pronounced veins, probably one of them at least larger than any of the northeast veins, these north-south or northwest-southeast veins being the Surprise-Pearl vein and the

(Testimony of Walter H. Wiley.)

Black Tail vein. Of the northeasterly veins the most northerly vein on the Lone Pine claim is shown near the northern end by an outcrop of quartz; a small cut run a little south of this point shows a similar outcrop. These have not been connected and I do not know just what direction that vein may take.

The first vein, the direction of which is plainly defined, is in a small tunnel driven in for about 30 feet. It shows a large northeasterly vein. It has not been developed beyond, so far as I know, the tunnel itself.

The COURT.—Is that 4?

Mr. COLBY.—No, it is one that is very close to No. 4.

The WITNESS.—We are speaking of the surface.
[454]

Mr. COLBY.—We are not sure it is number 4.

A. This vein has a direction rather more easterly than No. 4, and there is no work connecting it, so that I do not know. No. 4 vein itself at the surface is probably developed in a shaft which is very old and rotten and I have not examined that shaft except at the surface.

About 75 feet south of this tunnel is the discovery vein of the Lone Pine. The discovery point is at the summit of the hill and the vein has been opened recently by a series of surface cuts and trenches. At the immediate discovery point, that is, taking the discovery point as a stump, the blazed stump of a pine tree which is there to-day, we have no quartz at that immediate point, but 8½ feet to the north of

(Testimony of Walter H. Wiley.)

that point there is a plain outcrop of quartz. I have a specimen of that which I would like to show. This sample which I have marked 1-W lay in the ground in the position shown, the direction of the longest axis being easterly and westerly. It illustrates, first, the surface moss. This projects above the surface and there has been no excavation whatever at this point. So it illustrates the discovery vein at this point as it has doubtless existed for many years. The surface moss covers the outcrop for a portion of the way so that the quartz is not distinctly visible until it is checked off. Then it is seen to be solid quartz. The entire piece on the under side is plainly seen not a distinctly banded piece of quartz but still of that nature. It has come from a considerably larger piece. In taking it out it [455] cracked and some of it came off. This is $8\frac{1}{2}$ feet north of the discovery post and it is 2 feet east of the discovery trench. The discovery trench is a shallow cut running across the vein. In the eastern side of this trench the vein shows a very distinct band of quartz 16 inches in width. Going westerly from this discovery cut the vein has been followed by a series of cuts and at a point about 15 feet from the discovery there is more than five feet of solid quartz. This width is due to the fact that another quartz vein has come in and united with that from the discovery. Farther west the vein is not as large. This 5 feet is the largest place I have seen in the vein, but it can be distinctly followed clear across to the side-line, the west side-line, of the Lone Pine claim.

(Testimony of Walter H. Wiley.)

At a point about halfway down the hill there is a very plain outcrop 22 inches in width. That also illustrates the covering of the quartz by the surface moss and that you have to break it off before you see the real nature of the quartz. This piece looks to me like ore.

It has the banded nature and especially the dark streaks running through it which would make me think as a miner that it was worth testing to see if it would not be valuable ore.

Q. Let us have that marked. [456]

A. It is marked 2-W. There is one slight interruption as we go west in the work, due to the fact that there is a very large tree right over the outcrop, and the trenches have not been carried through under that tree, but there is no doubt whatever in my mind but that the vein, which has been followed above, is the same as the vein which has been followed below, so that we can trace continuous quartz to the west side-line. We could trace quartz in many other places besides this trench. It is not a simple, clear-cut quartz vein. There are a series of veins and small streaks of quartz. The system of small quartz veins which extends in a northeasterly and southwesterly direction, with some smaller streaks between these, extending northerly and southerly, a sort of link system of quartz veins. Going to the east, from the discovery, we follow this white quartz very distinctly for a distance of something over 100 feet, and then there is at that point a marked change. The country to the east is more stable and the large

(Testimony of Walter H. Wiley.)

streak of quartz which we were following disappears. Now, there is nothing on the surface at that point except the fact that the quartz has ceased to indicate a fault. But that of itself suggests the possibility of a fault. And in the workings underneath in the No. 1 tunnel drift running from that, we find that there is a fault which has dislocated the vein. That it has a strike and a dip such that if it continues it would come at the surface, somewhat near this point of interruption. The conclusion which I would draw as a miner, is that it is probable the interruption is due to this fault, but in the absence of development I would not be certain of this. However, [457] at about 10 feet farther to the east of the trench the quartz comes in again from the north side and has been followed to a place near the east side-line of the Lone Pine, where, for a shortance, I was unable to find any quartz, and for a considerable distance the quartz is quite narrow. I am not certain by any means that the entire quartz of the discovery vein is disclosed in this trench, but a portion of it is, and it is practically continuous and as a vein it is continuous in my opinion from the discovery to the east side-line. So that we have, taking the work as a whole, a continuous development, with a slight interruption, of the fault from the west side-line to the east side-line, of strong, well-pronounced quartz vein; not as strong a vein as other veins, but, speaking generally and comparing it not alone with the disclosure of veins in discovery shafts but with veins anywhere, it is a strong, presistent vein. It has val-

(Testimony of Walter H. Wiley.)

ues such as would justify not only its location, but its working in the expectation of finding ore.

Under the surface, coming south from the discovery we have a number of other quartz exposures. They have not been developed, and I don't know where they go. And the main information as to the conditions is derived from the No. 1 crosscut tunnel, which has been driven immediately beneath this area and intersects a great many veins. They are marked in red upon this model, and their direction is almost universally northeast. The north-south system as represented by the Pearl-Surprise and the Black Tail vein does not extend over this area. There are no north-south strong veins developed. The first vein, excepting the three upon which drifting has [458] been done from this tunnel, which we meet going south, is the No. 2 vein. It is the main strong vein of that section. On No. 4 vein, lying away to the north, some stoping has been done, but nothing like so extensive as on No. 2. It is a stronger vein than any of those to the north, and, as shown by the stopes, has been the vein which has constituted the main fissure and upon which the main work has been done. This is an unusually well-defined strong fissure vein, cutting down at an inclination to the south and its dip and strike are best shown in a general way by taking the stopes from top to bottom and from their eastern to their western end as shown upon the model. This vein crosses the eastern side-line of the Lone Pine. I have not been able to check up exactly the distance, but I think it was 598 feet.

(Testimony of Walter H. Wiley.)

Mr. GRAY.—589.

A. 589 to the southeast corner. That appears to me to be substantially correct. At that point, the vein does cross the side-line and extends northeasterly into the Last Chance claim, and from its surface in the Lone Pine, it has been mined continuously upon the same vein to the deep stopes beneath the Last Chance. Going in a westerly direction, either on the surface or on any of the levels, we follow this vein a number of feet in width, although variable, and on the surface we reach a point where it makes a bend. It makes a little bend in the stope itself on the level, as you can see from the surface; not a material bend, but something as it approaches the brow of the hill. That is no more abrupt a bend than we have in other places. So [459] that it might easily be just a local bending, or it might be, and in this case, it is a bend, I fully believe, due to a faulting further on. The vein is approaching a fault, and a fault and fracture in the earth's crust is due to a stress, of course, which breaks the crust of the earth and before even the solid rocks break they bend first, and then they break. Although the crust of the earth and the rocks may be brittle, still, as a mass, it is a common thing to see bends as you approach faults. In fact, to a miner, it suggests always the possibility of a fault, and the direction of the bend suggests to him the way to go to find the faulted extension beyond the fault. Now, on the surface, before we reach this fault at all, we have a very marked bending of the

(Testimony of Walter H. Wiley.)

outcrop. We have been coming along in that line, and the outcrop makes an angle of about 25 degrees, as shown by these two sticks of the bending of the surface. This is due to a small extent, to the bending of the vein of which I speak, but more so to the fact that a black vein is approaching a hill. I think a simple illustration of that would be—supposing this book is a vein. The top of it is the quartz outcrop which we follow on the surface. It goes over a hill. If that hill approached a vertical cliff, we would have a change in direction of 90 degrees in a vein which has no bend whatever. If the vein were perfectly flat, it would be a change in 90 degrees in direction on a plane. If it is an inclination, the change in direction varies according to the inclination of the vein in connection with the amount of the erosion. But a better illustration is to take the exact conditions in the ground. The contours [460] show the surface of the ground. The red shows the vein a perfectly straight vein coming there, is necessarily at its outcrop thrown down the hill. It is a question of the cutting of one plane by the plane of the surface of the hill. Now, that is not all. In this case as we go down, we meet a trench at the end of the red, painted white with a streak of blue. There is a marked change at this point. The quartz which we have been following from above, several feet in width, is intersected by a fissure, and we do not find this large amount of quartz, although we do find quartz along that fissure, until at a point 30 to 40 feet farther down, we again encounter a large amount of

(Testimony of Walter H. Wiley.)

white quartz. There is a marked change for that space between the quartz which we see above and the quartz which comes in below. The quartz of the two places is similar so far as I am able to detect. They might easily be from the same vein. That is a common thing in a district that the quartz is similar, and yet to the man who has mined in tons, and shipped it, there may be striking differences which are not apparent to the casual visitor. On the model, the quartz just below is colored yellow. It is only a small occurrence, and is not very perceptible, but there it is colored yellow. Now, the color scheme of this model is simple, red for the northeast-southwest veins and yellow for the northwest-southeast veins. And as I said before, the only northwest-southeast veins shown are the Lone Pine Surprise which extends straight through the country, and the Black Tail vein which has been developed to the south and extends in a northerly direction.

Q. You called that the Lone Pine Surprise. You meant the Pearl Surprise, didn't you? [461]

A. Yes, I meant to say the Pearl-Surprise. Now, the Black Tail vein is known beyond question to the south in the Black Tail claim, as at its discovery, which is one of these cuts near the south end, there is a plain well-defined quartz vein, several feet in width, a big outcrop of quartz on which you can walk. A discovery point is marked upon the surface map and the quartz outcrops to which I alluded is indicated by the yellow color in connection with the work at this point. You can walk

(Testimony of Walter H. Wiley.)

along on that wall for a ways, just as if you were on an artificial stone wall and all at once it terminates. There is nothing there to prove a fault, but looking for the extension of the quartz we have to look over to the right for a distance of 30 feet or so where we see a smaller wall extending on. There is no question but that that is due to a fault, although we see no fault whatever on the surface. We only see the evidences of a fault in the displaced section of the vein. There again, underground, we do find a fault which has a position that indicates that this surface exposure where there is a break in the quartz of the Black Tail vein, is due to this underground fault. We are able to follow this Black Tail vein with break very clearly, in a northwesterly direction, up to the most northerly cut up to 63-C. There is a good strong vein pointing directly in the direction of the south end-line of the Lone Pine, but we do not see any vein whatever beyond that on the surface. It suggests that a similar thing has happened to that to the south, that there has been a fault. Farther north in a surface [462] cut on the Lone Pine claim, there is a strong, well-defined quartz vein. I always considered that that was the Black Tail vein. I had no doubt in my mind that it was except that the recent development which has been run to and across the end-line has utterly failed to find any vein which corresponds in size and character with the Black Tail to the south so that I must qualify my opinion by saying that while I believe that the Black Tail vein

(Testimony of Walter H. Wiley.)

continues on ore coming from the other direction, that the Black Tail vein continues to the south to the end-line, I further fully believe that there is some faulting in there which has not been developed, and the probabilities are that the vein lies to the east and farther up the hill and is not disclosed in the underground workings. The quartz vein which has been followed in the surface cut near the south end of the Lone Pine claim is necessarily interrupted by a gulch, Eureka Gulch, which cuts through. One other thing I perhaps should mention while here, that there is a trench across the end-line of the Lone Pine, and that this trench is about 10 feet deep—and in the bottom of that trench there is a large chunk of quartz, perhaps twice as large as this specimen, Exhibit 1, of pure white quartz, vein quartz, beyond question, but it is entirely in wash so far as I can see. It may be on the under side attached to the bedrock and be in place, but I very much doubt it. Now, this gulch, Eureka Gulch, which cuts through interrupts— [463]

Q. I think that is called the Pine Gulch?

A. Pine Gulch, and Eureka is below, that is true. Pine Gulch joins Eureka a short distance below. It entirely interrupts the tracing of that vein on the surface. If this strong quartz vein, which appears as a wall standing above the surface, very much harder than the porphyry country rock, had continued unbroken through there; it is extremely likely that we would have seen more of the outcrop. The gulches are always lines of erosion

(Testimony of Walter H. Wiley.)

where, for some reason or another, the rock is softer or through fissuring or some other agency, is rendered more susceptible to erosion, more easily worn down. If that were not true, we would have no gulch. In a trench immediately below this gulch, recently run we do find what I will call the Black Tail vein, because I believe it to be the extension of the Black Tail vein. We find it developed by a winze some 40 feet in depth, and either a raise above that or the winze is sunk from the surface, I don't know which, continuing down. That contains the same body of quartz which has been followed in the trench above. Going north from this winze, this same vein has been followed a distance of 15 feet or so and shows in the end of the little drift. Beyond that the wash comes in so that it cannot be followed. This winze has been sunk 40 feet deeper and at that point a curved drift has been run in country rock. There is vein material in the winze itself and, as colored blue on the surface, that is meant to indicate a fissures along [464] which there has been faulting in that winze; but the main drift itself, as run, is in country rock. Two small crosscuts have been run from this drift in a westerly direction. The first one is totally boarded at the end and I do not know what is in it. It indicates that there has been caving ground. The second one, at the time of my visit, was full of muck and was just blasted clear to the top. There was nothing visible but the top, and I do not know what showed in the bottom. South from this tunnel, which runs into

(Testimony of Walter H. Wiley.)

the gulch winze, the Black Tail vein has been followed for a short distance, as shown by the yellow coloring, and this tunnel, which has two branches, has been driven, I presume, to develop the extension, but at a short distance on it reaches a closed fault, which terminates the showing of quartz in that tunnel, and beyond that I did not find the vein. Above this, near the surface, there has been other tunnels, the upper two, or surface tunnels, entirely in wash, but a tunnel underneath has been driven, which is in solid formation, and has reached a point practically underneath the end-line. There is some quartz in there, but its direction and quality does not correspond in any way with the big Black Tail vein that shows just beyond. So that is part of my reason for my belief that the same Black Tail vein has not been developed by any of that work, possibly lies up the hill farther as a fault section.

(Whereupon an adjournment was taken until 2 o'clock P. M.) [465]

Thursday, August 26, 1920, 2 o'clock P. M.

Trial resumed.

WALTER H. WILEY resumed the stand as a witness on behalf of the defendant and testified as follows:

Direct Examination (Resumed).

(By Mr. COLBY.)

Mr. COLBY.—Before we proceed, may it please your Honor, we have overlooked one sheet in our assays that was taken at the discovery point. Mr. Wourms called it to our attention that there were

(Testimony of Walter H. Wiley.)

more assays than showed on the sheets that were put in. By mistake, Mr. Robbins had one of those with other assay sheets, and we would like to attach this. As a matter of fact, the showing is lower than on the other sheets.

The COURT.—It may be attached and admitted. The witness may now proceed with the examination.

Mr. COLBY.—Proceed, Mr. Wiley.

A. I had followed the vein which I believed to be the Black Tail in a northwesterly direction to the Pine Gulch and had also traced the Lone Pine No. 2 vein in a southeasterly direction, to about the same point.

Q. Southwesterly.

A. In a southwesterly direction to about the same point. Extending in a southwesterly direction on the opposite side of Pine Gulch, to the disclosures on the Lone Pine No. 2 vein, there are several surface pits marked 574, 575, and 576, which disclose a strong quartz vein, several feet in thickness, carrying quartz similar in nature to that of the other veins, and having a direction southwesterly, approximately [466] parallel to that of the Lone Pine No. 2 vein. It is not in the direct extension of the workings, but is offset to the south. The surface, on account of the wash, discloses nothing except as we may surmise from the absence of the quartz and from the fact that there is a line of erosion. Immediately beneath the surface in Lone Pine No. 2 tunnel, we have a series of workings which throw some light on the matter. As we come

(Testimony of Walter H. Wiley.)

in Lone Pine No. 2 tunnel, the first vein of size which we encounter is a vein running in a north-westerly direction, developed by a short drift and by a winze which is filled with water. There is a strong quartz vein at least 2 feet in width, having a dip in a northeasterly direction, disclosed in those workings. [467]

The COURT.—How far has that been developed?

A. The model of course will show the exact location of the gulch, and the distance is about 80 feet northerly, you see, this way, which is shown with the yellow coloring upon this model.

The COURT.—How far is that from the No. 2 vein?

A. That is immediately adjacent to the No. 2 vein, and extends northerly and away from it.

The COURT.—How far?

A. As we go north about 25 feet in the face of the drift. In the face of that drift it is plain to see this vein which extends on in a northerly direction, but has not been developed at that point. In the surface above this I do not see anything corresponding to this vein, but in the tunnel, which has been driven at a distance of about 400 feet farther to the north we encounter a vein at a distance of about 80 feet in that tunnel from its mouth running in a direction and similar in character to the vein shown in the winze.

The COURT.—What is the distance between these points, approximately?

A. The distance is about 800 feet, but I will give

(Testimony of Walter H. Wiley.)

it to you more accurately.

The COURT.—That is close enough for all practical purposes.

A. No, it is not that much. It have been just doubling this scale. It measures a little less than 9 inches, which is 360 feet. About 350 feet between these points. Now, on the surface immediately above here there is no indication of that vein. It is covered with wash. [468] The nature of the vein at the northerly exposure is more of a fault nature, more clay than there is to the south. Parallel to this vein and cut right at the mouth of the Pearl tunnel is another vein; and on the surface there is shown alongside the railroad about 400 feet farther south another exposure of the same vein, I believe, as cut at the mouth of the tunnel, the Surprise vein. Now, in this case of the Surprise vein I have not seen for a long distance any indication on the surface of the vein, but I unhesitatingly call it the Surprise vein, because in addition to the vein a drift runs continuously underground. The nature of the vein through there is different from these quartz veins in that there is a great deal more clay there. As we go to the north on these claims the clay seems to be increasing in quantity. There is quartz at intervals, but the nature of the veins has somewhat changed. So I believe that the vein which is cut in the winze, if it continues to the north, as I believe it does—I know it does, as far as I can see, is represented by the vein cut in the Pearl, and that it extends northerly substantially

(Testimony of Walter H. Wiley.)

parallel to the Pearl-Surprise vein. This vein does not line up as we go south exactly with the Black Tail vein, which I believe it to be, any more than does Pine No. 2 vein line up exactly with the surface disclosure of quartz which I believe to be its extension. There has been faulting between these points, not simply one plane, but there are several fractures. We encounter a fault plane going down the gulch winze. We encounter a fault plane as we go in the tunnel driven to the south on the [469] Black Tail. And we encounter a fault in the surface stoping. And in No. 2 tunnel we find a fault plainly shown, first in a little crosscut at Station 656, driven to the south, we find lumps of clay, along what I believe to be the Black Tail vein; and further in, in the second crosscut at 64-C we find a strong line of fault running across that and in the main crosscut of No. 2 tunnel, at about 20 feet beyond the winze we find another. It is a complex system. The drift or tunnel which is driven south from the last known—absolutely known exposure of No. 2 vein has quartz shown at intervals along the south side, and follows a very clearly, plainly defined fault, plane for a considerable portion of its distance. Near the westerly end of this trench, it has been bent sharply in a southerly direction and leaves the fault and vein and extends for a greater portion of the distance through slide, through wash. That portion which is colored red and blue upon the model extending to the right, follows a distinct quartz vein, to a point near its surface. The quartz

(Testimony of Walter H. Wiley.)

there is seen on the right-hand side of the drift. Now, the first time I went in there, as I nearly reached this drift, the men came running out saying it was caving, and I could hear the rocks and see them falling down, and I went out immediately on to the surface and I could see a hole on the surface, where this slide rock had caved from the surface. Back of the point where the cave was, when I tried to look up in the roof of this drift, which was closely timbered on account of the cave, I could see an opening extend up for a number of feet. I could see a little quartz there, but nothing that seemed to me to be in place. Whereas, [470] the bottom of the drift on the right-hand side as you go in is certainly in place and shows a distinct streak of quartz of considerable size extending in the direction of that drift. Now, this fault which has been followed by that drift, and which, as I said, is, in my opinion, represented by two or perhaps three branches, as we go to the east straggling out from one fissure to two or three, is the reason why the opposite ends of these two veins do not align; they are faulted directly beneath the gulch, the Lone Pine No. 2 vein being thrown somewhat to the west and showing its extension to be southwest in the surface cuts which we see.

The COURT.—What is the distance between the two ends?

A. The distance between the southwest end of the drift and the nearest point of the incline which is

(Testimony of Walter H. Wiley.)

swung along some 20 feet to the west, under the wash, is about 60 feet.

The COURT.—What is the distance between that and the end of what you conceived to be the other end, the Black Tail?

A. The distance between the next exposure of the Black Tail to the south from the nearest point of this drift is about a little in excess of 40 feet, and to the northern exposure—of course, that is measuring along the strike of the fault is about 100 feet.

Now, this fault vein is an irregular vein and the planes of the vein are irregular. The motion along this fault, instead of being as we would see it measured on a drift horizontally, has undoubtedly been more nearly in a vertical direction. I say this because the evidences of motion as we see them on the veins, or in the country rock adjacent, are usually distinct grooves, some hard projection, as the [471] ground moved one on another along this split. And if those grooves are plain and distinct, they are a definite indication of the direction of the movement. In this case, in these grooves where we can see them, both in this and in the Surprise vein, which is a very strong fault line, are within about 15 degrees of vertical, or straight down on the dip of the vein. Instead of that, they change a little to the south of straight down. So that the motion vertically, would be very considerably more than the horizontal, resultant as we see it in the ground.

The COURT.—What was the extent of that fault?

(Testimony of Walter H. Wiley.)

A. You mean the amount of the displacement?

The COURT.—Yes, sir.

A. I really don't know. For me it is rather a difficult thing to determine, but to approximate it, if we assume a movement of about 100 feet, as a thrust fault, that is, a reverse fault, the hanging-wall moving up instead of down, as it sometimes does, it would explain the position of these veins.

The COURT.—What is the extent of it in other directions?

A. The horizontal displacement varies greatly on different levels. The best illustration, perhaps, of that, would be on the map where we have the vein on the surface in Pine No. 2, the extension to the southwest, and making this band along the fault, so that the horizontal displacement, if you measured at right angles to the vein, over to a point opposite where this extension would be, if extended, would measure 50 or 60 feet, but if you take the distance between the last [472] occurrence of quartz, it might be nothing, and would be very much less than that.

Now, having said that, perhaps I should try to explain how that can be—nothing one place and a great deal another. If this represents a vein, and the line between the two books, the line of a fault, and we have a motion downward or in any direction, we can have a point at which the two ends of the vein represented by the two books meet, and another point where they are widely separated. Especially is this so if our vein is wide. We

(Testimony of Walter H. Wiley.)

may have a motion, say, if the width of that book on a scale of 40 feet to the inch, is 40 feet, we can have a motion where there is a perfect contact of the back side of one book with the front side of the other, which is represented by quartz, would be a continuous connection on the quartz, yet actually a horizontal distance of 40 feet, so if the quartz is homogenous on both sides of the vein, as a miner drove through there, he would not know he had the quartz.

Now, my reasons for believing that the Lone Pine No. 2 vein extends in a southwesterly direction and across the west side-line of the Lone Pine, instead of making a bend to the south, joining with the Black Tail vein, are based not only on the occurrence of this fault which I have seen on the extension of this vein to the southwest, where there is as much as 5 feet of quartz, which is pay ore, corresponding except for the lack of stopes, exactly with the Lone Pine to the northeast, but on the fact, that there would have to be a very phenomenal turn to make the Black Tail extension, now, there may be phenomenal turns, phenomenal turns [473] are very common, which make a letter "Z" or most any shape under some conditions, but it is not at all common to have a turn continuing as this does, indefinitely, and when we have a choice, if there were nothing else to determine than the existence of this vein in line, and this vein at 90 degrees, as a miner you would not hesitate to say that the vein turned there. If the Lone Pine No. 2 vein were the same

(Testimony of Walter H. Wiley.)

as the Black Tail, the yellow space and the red space on the same vein, then as we go down in depth, they should remain on the same vein. We must not only figure the relation on the surface, but the relation in depth. [474]

A. The last seam of the Lone Pine vein in the deepest working in the Chance claim, the bottom level, it is continuing down in the same regular plane, comparatively regular plane, observed everywhere throughout the area shown by stopes. How deep it will continue in that direction, of course I do not know. But the vein as shown on the red stopes must be the same vein, if it is at the surface, must be the same vein in depth as shown by the yellow stopes. If we connect them by the nearest straight line with the deepest known workings, we would have to have a vein which runs substantially as shown by this paper (indicating). If we assume a continuation in depth of the Lone Pine vein, and it is almost certain that it will continue for some distance, then we must assume a bending somewhere along there on this vein deeper down in order to have it identically the same as that of the Black Tail, as shown in the Black Tail stopes.

The COURT.—The Black Tail has never been developed beyond the yellow?

A. The Black Tail has been worked, so I am told, by a winze and drift shown here. All I personally know about that is that that winze is entirely full of water. I have never seen it or even heard what was found in there. It is put on the model—

(Testimony of Walter H. Wiley.)

The COURT.—There is nothing there at present to indicate the point where you are below here?

A. There is nothing to indicate except that the Black Tail continues downward as it does above. Now, there is an added reason why I do not believe this makes the turn, and [475] that the yellow stopes are on the same vein as the red. As I said, there are two systems of veins, the Pearl-Surprise, a strong vein running northwesterly, and the Black Tail, a vein substantially parallel. The Pearl-Surprise vein continues straight way north of where the bend would have to be in order to switch the Black Tail over to the Lone Pine.

The COURT.—That is shown by development?

A. That is absolutely shown by development underground. And I would expect that the Black Tail vein being of the same system parallel would continue substantially to the north in the same way. And when I find a vein, as I do in the Pearl tunnel, it simply corroborates the belief I have that that is the extension, and that it does not make any abrupt turn different entirely from the Pearl vein of the same system.

Cross-examination.

(By Mr. GRAY.)

Q. Mr. Wiley, his Honor asked you how far it was in this drift on the No. 2 level between the southerly exposure of what you have termed the Pine vein and the nearest exposure of what you have called the Black Tail vein, and you said it was 40 feet in a southerly direction. How far is it, as a

(Testimony of Walter H. Wiley.)

matter of fact? It is less than 10 feet, isn't it?

A. I am measuring from the end of the drift to the end of this drift. [476]

Q. Why did you overlook the exposure in what you have all conceded to be that vein in the said winze just a few feet below?

A. That is deeper down where there is a little exposure of a vein which may be the Black Tail, and very possibly is.

Q. How far is that?

A. Measuring down to that exposure in depth would be probably 15 feet, but the distance direct is on the same level between the ends of the drifts.

Q. Projecting that up to the level of the No. 2 tunnel from the sand winze, how far would it be from the end of the 331 working?

A. It could easily connect actually with it, if you put a raise up from there it would actually connect.

Q. If it comes up on its ordinary dip it would connect with it at the end of that drift?

A. Or nearly the end of that drift.

Q. And this other vein which you have said may be the extension—or expressed the opinion or assumption—is how many feet from this of the 331?

A. The end of the incline is about 60 feet.

Q. Mr. Wiley, do you desire his Honor to understand that you are in the habit of projecting an exposure such as you have in No. 2 tunnel at Station 64-C 380 feet through the undeveloped territory to a point such as 92-C and say they are the same vein? [477]

(Testimony of Walter H. Wiley.)

A. Never with positive certainty and always accompanied by an explanation explaining my reasons for the belief.

Q. The only reason is that you have a fault in each place with some quartz and some gouge?

A. We have a good vein of similar character in each place.

Q. Is the strike the same? A. Strike is similar.

Q. Is it the same? A. Very much the same.

Q. Get your notes and let's see.

A. My notes are simply as I platted them on the map.

Q. You didn't take an actual course?

A. I took the actual survey as shown on the map, and in each case it was so marked. I will show you.

Q. No, never mind. Did you actually take an observation underground of these two strikes?

A. I certainly did not. Of the drift—when there is an actual drift I always take the surveyor's notes. They are much more accurate than the compass which may be affected underground. If there is no actual development then I take the compass course.

Q. So you didn't take the course on No. 2 tunnel?

A. On No. 2 tunnel I took it from the surveyor's map, where the vein corresponds with the strike of the working.

Q. Did you take the course at 92-C with your compass?

A. There I have taken the course and platted it on. [478]

Q. What is the course?

(Testimony of Walter H. Wiley.)

A. I haven't it noted except as I can scale it from the plat.

Q. What is the dip?

A. Sixty-five degrees at one side and 72 at the face of the little crosscut in an easterly direction.

Q. What is the dip over here on these veins that you have described, as they cross No. 2 tunnel?

A. Sixty-three degrees.

Q. I want you to just show his Honor that map. (The witness exhibits the map to the Court.)

Q. That shows the actual observation that you made underground, does it?

A. Not altogether because I don't write down in full the details.

Q. No, but I mean that it represents that vein as you observed it, together with the fault as you observed it underground?

A. The blue represents the distinct fault streaks; the red represents the veins.

Q. Now, then, at Station 331 on your map and on your notes you show it, don't you?

A. I show quartz.

Q. Of what vein?

A. The quartz there is possibly the quartz of the Lone Pine vein.

Q. You show the quartz of the Lone Pine vein on that same level up to within how many feet of the quartz on the other side of the fault? [479]

A. Well—

Q. No, in feet.

A. The picture shows for itself. There is a little

(Testimony of Walter H. Wiley.)

light red tracing through there. There is some quartz accompanying the slip, practically continuous.

Q. What is the actual displacement of that vein on this level according to your own observation, by this 100-foot fault, in feet? A. If this—

Q. No, no; just in feet. Just measure it and then if you desire to explain, do so.

A. The displacement would be measured by taking in this case on one side of the vein, say the north side, and the north side of the other and as you measure that along the fault there it is about—not over half an inch—would not be over 20 feet; but that does not represent the 100 feet of displacement or the necessary displacement at any other part.

Q. But it represents the actual displacement shown on the level of the vein? A. No, not at all.

Q. Along the plane of the fault?

A. Not at all. May I explain why?

Q. Yes, indeed, if you can.

A. Because that assumption is based on the fact that we have a vein here and it slides to there (indicating). If that were correct, that would be perfectly right. But [480] instead of sliding horizontally from there to there it moves up and down as you suggest 100 feet.

Q. One hundred feet you said?

A. So that the portion of the vein which is here now corresponds with a portion of the vein which was originally 100 feet here and off on the vein. If the two points are a different width and on a warped surface instead of a mathematical plane then that

(Testimony of Walter H. Wiley.)

does not represent the displacement. It is the observed horizontal observation of the displacement at that point.

Q. It is the observed displacement; it is the assumed length there, determined in order to work out your theory. You haven't measured that on the ground to show that displacement?

A. There is no theory whatever, either in this map or in my mind. It is as near I can recall the observed facts as I saw them. I afterwards make my theory.

Q. As a matter of fact, it is true that you follow what you call the Lone Pine vein southeasterly from Station 103 through to Station 326 and into the little crosscut running easterly from Station 65-C?

A. Yes, I don't follow it into that crosscut; I had to go around.

Q. But you believe it to be there? A. Yes.

Q. You desire his Honor to understand that in your opinion that vein between that point and the point where you pick it up near Station 331 has been faulted by a fault of the magnitude you have described? Yes or no. [481]

A. I know it has been faulted—

Q. Yes or no.

A. And the magnitude, in my mere estimation, would approximate 100 feet.

Q. An apparent displacement of practically nothing on the level?

A. It might be absolutely nothing at one point. In this case it is perhaps 20 feet.

(Testimony of Walter H. Wiley.)

Q. Now, Mr. Wiley, I note that you have shown in a drift northerly from the gulch winze, you have a vein which has what course?

A. Generally north.

Q. That vein is gently inclining from a south-westerly direction to a northerly direction as you follow it there, isn't it?

A. As you follow it back to the south, bending.

Q. Let's use the word "bending." It bends from a course of northwesterly to northerly, doesn't it?

A. Yes, it bends in that direction.

Q. And it is the same vein in your judgment that is disclosed in the sand winze?

A. Well, the sand winze, I don't know. I have always had a mental reservation as to whether the small piece of quartz—this is a little winze entirely in wash except that it shows vein quartz in the bottom. That quartz may be Black Tail or it may be Lone Pine. I do not know. It has no structure by which I can determine it.

Q. This fault that you speak of cuts through the vein on No. 2 level on Station 331? [482]

A. It follows along the vein partly cutting through and cutting through farther to the north.

Q. And following the footwall?

A. For a ways, yes.

Q. You follow it much farther than you have shown on your notes, don't you?

A. That is as far as I have observed the plane of the fault, but it may extend farther.

Q. What is the southern movement of what you

(Testimony of Walter H. Wiley.)

have chosen to call the Lone Pine vein which you show near Station 64-C on the other side of the fault, on the east side? A. It is represented—

Q. No, I mean of the Black Tail.

A. It is shown in the winze and the drift from which the winze was sunk.

Q. On the east side of the fault?

A. On the east side of the fault the nearest known point is shown on the face of the drift running north from the gulch winze.

Q. How far is that displaced, apparently, on the level?

A. Between what two points do you mean?

Q. We will assume that it is the same one as in the sand winze.

A. If it is the same one as in the sand winze there would be no displacement between it and the south.

Q. Then to the north, Mr. Wiley?

A. From the northern exposure the sand winze is a distance of about 80 feet. [483]

Q. Was that vein dragged any by this fault that you have talked about? Do you find any drag to that vein?

A. Well, I think they have both been dragged in the sense that there has been broken quartz and that both veins have been bent slightly before they approach the fault.

Q. This is what you find opposite 331; is in place, isn't it?

A. Yes, except that it is along the fault.

Q. Yes, but it is in place?

(Testimony of Walter H. Wiley.)

A. Yes, but a portion of the quartz immediately along the fault is fault drag in the sense that it has been bent out of position by the fault.

Q. Now, have you your notes of the working 558 just above the No. 2 tunnel that we have been discussing? [484]

Q. Mr. Wiley, as a matter of fact, you can follow down that drift and get continuous quartz, can't you—that trench, I should say.

A. You can get most excellent, large continuous quartz to the point where the Blue fault comes in, and then you find a large bunch of excellent quartz to the top of that, but there is an interval in there where there is very much less quartz.

Q. Very much less, but there is quartz.

A. There is some quartz; yes, sir.

Q. All the way; yes, sir. Now, does the fact that there is much or little quartz make any difference in the placing of a vein?

A. In such a case as this, yes, sir, where you have a large, five-foot or larger vein, then you find a vein sharply going across the end of it and having a different direction, and along that vein you find a very much lesser amount of quartz, which can be easily explained as a drag falls with the fault, which is entirely different from the pinching out or the change of a vein from a large one to a small one.

Q. At the point 63-C you said you saw the Big Black Tail vein crossing northerly.

A. Yes, sir; I saw what is unquestionably the Black Tail vein.

(Testimony of Walter H. Wiley.)

Q. You found nothing comparable in size with it in the trench at 61-C, in the end-line trench, therefore you thought it did not go through there.

A. I thought, taking into consideration the fact that [485] the habit of faulting seems to be very prevalent, that I have found a fault to the south.

Q. How many hundred feet?

A. About 400 feet. But it is extremely probable that there is another fault there.

Q. Now, the fact is that from there north, it is covered with wash and drift, glacial drift and wash.

A. That is the very reason that I believe it is a fault, because you come along the open faults and then you go into wash.

Q. As the wash covered the vein, do you think you have struck a fault?

A. If I find the extension as I did here, going on to the north, I know I have found a fault. If I am unable to find an extension, I don't know, I only suspicion a fault.

Q. You thought that the showing in this end-line trench was not of such magnitude that it compared with the vein at 63-C.

A. It looks to me like a chunk of quartz that has rolled down the hill from above; it is entirely in wash as far as I can see, except that I have never seen the underside of that.

Q. You did not see these streaks of stringers along there? [486]

A. I saw those little streaks of quartz in the tun-

(Testimony of Walter H. Wiley.)

nel below. Excuse me, Mr. Gray, you asked about the surface trench.

Q. I meant the tunnel.

A. The tunnel is under the trench deeper down. That is not in wash; that is in place. There are several stringers of quartz, but they do not begin to compare in any way with the Big Black Tail vein.

Q. Why, Mr. Wiley, you are not unfamiliar with veins that are as wide as 55 feet pinching down to an inch, are you? A. They might.

Q. You know very well the vein which was involved in the Argonaut-Kennedy litigation, do you not? You were a witness in that case.

A. I remember something of the case.

Q. You remember of tracing that vein from a width of 55 feet to a width of an inch, don't you, in a very short distance?

A. I think that vein got thinner than an inch.

Q. So that that would not be unusual, would it?

A. It is possible.

Q. A miner, however, can follow down that trench 558 and into the trench and be in continuous quartz, can't he?

A. He could follow from one vein across a fault, which is a third vein, into a second vein, and be in quartz all the way, of some sort.

Q. Irrespective of all of these faults, etc., that have been introduced, he can do that, can't he?

A. He can do that. [487]

Q. There is one thing I want you to explain. These faults are rather persistent, aren't they, and

(Testimony of Walter H. Wiley.)

rather strong as you have observed them?

A. No.

Q. You think they are rather continuous, don't you?

A. Not always. Some of them are, and some are small.

Q. Does a fault of a hundred feet throw as much as that and die out quickly?

A. Sometimes abruptly. May I explain why?

Q. If you wish.

A. For instance, the main strong fault is along the Pearl Surprise. How much motion has been, I do not know, but it is often two or three feet of clay with deep grooves scored in solid quartz. There must have been a tremendous movement. And when that country, one side of that vein moves relatively to the other, there were necessarily a lot of subsidiary fractures, and I fully believe that these veins, these faults in that section have something to do with this big pronounced fault. The result of that is, for instance, that going in a southwesterly direction, these fractures will certainly—not certainly, no, there is nothing certain—probably stop on the Pearl-Surprise fault, and that they will extend out from that to a limited distance.

Q. Did you find any such faulting along what you confess to be the Black Tail vein, over in the Black Tail workings?

A. Yes, distinct lines of movement along the vein.

Q. Not a great fault such as you have described along this Pearl-Surprise? [488]

(Testimony of Walter H. Wiley.)

A. Not so great. But in that other particular stope, standing right there in the open air, you can see the quartz and distinct grooves on it. There has certainly been extensive movement also in the vein of the Black Tail vein itself.

Q. What was the thickness of the fault material in the widest place in those faults.

A. It is simply a grooving, like a chiselling in the quartz itself.

Q. Tell his Honor how thick that quartz material was. You have told us about the Pearl Surprise vein, how thick it is over there. How thick is the gouge that you found in this fault in the Black Tail?

A. I don't find any great thickness of gouge comparable to this.

Q. What is the thickness, Mr. Wiley?

A. I cannot tell you that.

Q. An inch?

A. It is common to have some gouge.

Q. An inch?

A. Yes, much more than an inch in places.

Q. Two inches? I want you to give the most you can remember and tell us where.

A. Well, I have merely the mental memory that there is gouge in places. Whether it is thicker than two inches, I could not say.

Q. You compared that vein with the Surprise vein, and said it was very similar. You did not find any such gouges in the Black Tail vein as

(Testimony of Walter H. Wiley.)

those you have described in the Surprise vein, did you?

A. Through the ore body, no, I did not. But I do find [489] these evidences of faulting in the vein, which are more convincing to me than any gouge could possibly be, that there has been movement there.

Q. You did find one continuous fault here that you assume was continuous, extending, I believe, from the No. 4 vein, so-called through to what level is that, the 100 level?

A. I never assumed the continuation of that. It is marked on the model by a blue line crossing No. 4 vein, and there is another blue line in the northern end of the drift. I believe that those two are the same.

Q. And you said you believed also that they indicated a faulting of the discovery vein.

A. I said that I found interruption of the quartz in the discovery vein which I believed to be due to a fault, although I saw no evidence other than the interruption; that is, no clay or anything of that kind at the surface, and no grooving. That underground a long distance, if there was a fault which if continued on its strike and dip would come approximately where this fault was, I think maybe the same.

Q. And that fault is so small that it does not even displace the ore?

A. It displaces it only a few feet.

Q. Now, Mr. Wiley, this great big fault which

(Testimony of Walter H. Wiley.)

you have described, and which you have given an opinion concerning as faulting above the so-called Black Tail and so-called Pine No. 2 veins, if continued on its course, is bound to show in some of the trenches between the discovery point on the Lone Pine and the west side-line, isn't it? [490]

A. If it continued through that distance it would show it.

Q. Did that fault that so-called discovery vein?

A. No, it has terminated before reaching that.

Redirect Examination.

(By Mr. COLBY.)

Q. What explanation have you to give for its not having faulted the discovery vein?

A. There is a termination some place where all faults end. This particular fault is not represented by one distinct plane, but by two or three, I think by three, that branch in the No. 2 tunnel into 3 branches, and it would not be expected to continue to a great distance beyond that.

Recross-examination.

(By Mr. GRAY.)

Q. If you will come over to this plat, you have undertaken to connect up a vein over in the No. 2 tunnel, with one which is shown near Station 320. Where did you find that in the crosscut on the No. 3 level? A. May I show it on the model?

Q. Yes, I would be glad to have you point it out. Show it on your map first.

A. It comes right under the workings above.

(Testimony of Walter H. Wiley.)

The vein which is faulted by the winze is there; in the No. 3 level, right exactly where you would expect to find the extension, there is a vein.

Q. What is its strike? Get your notes on that.
[491]

A. I have that marked north 50 degrees west and a dip of 65 degrees at the south side.

Q. And at the north side.

A. Fifteen degrees from vertical.

Q. And you thought that was the same vein, did you, the Black Tail vein?

A. I think it is probable.

Q. Has any work been done on it?

A. No, none at all.

Q. How thick is it?

A. There is a very pronounced vein, but not over a foot in thickness.

Q. How much of that is quartz?

A. I do not recall exactly. There is some quartz in the vein.

Q. How much of it is gouge?

A. There is a great deal of gouge, and grooves indicating movement.

Q. Now, let us see where that is in the No. 4 crosscut. Do you find it there?

A. The No. 4 crosscut is way over here. This vein in No. 3 is there, so that if it came in No. 4, it would be back just about where the fault comes in if it continued on its downward course.

Q. Do you find it?

A. No, I did not identify anything very de-

(Testimony of Walter H. Wiley.)

finitely. There is a vein farther back in the cross-cut, quite a distinct vein.

Q. That is, back here where these two red lines are? [492]

A. I do not identify that with the development.

Q. Why?

A. It is not similar in position or character.

Q. Well, anyway, you did not find it on the No. 4? A. No.

Q. And you looked for it? A. I looked for it.

Q. Did you find it on the No. 6?

A. I find this fault—

Q. No, I didn't ask you about the fault.

A. But the Black Tail vein itself, would not, if it continues, appear in those levels.

Q. Why?

A. It would be back of those levels as shown by my pointer No. 2, and you would not expect to find it in any of these deeper levels.

Q. On that level there? You say it would not reach that level?

A. It would be 100 feet back of that level if it continued at this depth. I am holding my pointer as nearly as I can on the line connecting the winze and the exposure in the No. 3 level. [493]

Q. Now, you give me the course, north 50 west, south 50 east, and let us see.

A. If you take the course as known above, which you should, the course of that particular shoot is—

Q. The more particular one is the No. 3?

A. To the south.

(Testimony of Walter H. Wiley.)

Q. South 50 east?

A. If it kept that course it would be still here—

Q. On the No. 6 level, put it down.

A. It might intersect this level, No. 6 level, at some point on the foot.

Q. You do not find it?

A. I find nothing there except the fault itself.

Mr. GRAY.—That is all.

Mr. COLBY.—That is all.

Witness excused.

Mr. COLBY.—That concludes the defense.

Mr. GRAY.—I want to call Mr. Searles in rebuttal.

Mr. COLBY.—Those exhibits, of course—

Mr. GRAY.—They are all received, Mr. Colby.

Mr. COLBY.—Received. I believe rocks have no numbers.

The COURT.—They are referred to by the numbers on them, I suppose.

Mr. COLBY.—Yes, I think that is sufficient.

Mr. GRAY.—Suppose we take a recess for 10 minutes.

The COURT.—All right.

(Thereupon a recess was taken.) [494]

Thereupon the following evidence was introduced in rebuttal on behalf of the plaintiff:

**Testimony of Fred Searles, Jr., for Plaintiff (In
Rebuttal).**

FRED SEARLES, Jr., called as a witness in rebuttal on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. GRAY.)

Q. Mr. Searles, did you in your examination observe the fault that has been described here by the witnesses for the defendant?

A. I observed the gouge which is coincident with the line that has been described as this fault in certain places.

Q. Will you now describe that, using any of these maps that you wish, describe the character of it, the throw along it as you observed it, and its effect upon the discovery vein, if any, and such explanation as may be proper in your judgment?

A. The gouge which as I understand is supposed to represent the plane of movement of this fault is mapped on the 10 scale map, Plaintiff's Exhibit 4, on the footwall of the vein opposite Station 326. In making this map I had supposed and think it is entirely probable yet that that gouge continued out to the point C, because there is gouge across the crosscut east of 320-A which lines up exactly with it, and that gouge is also shown further out also lining up with it. However, I am not at all sure that part [495] of that gouge does not turn around to the point B' as it mapped on the maps

(Testimony of Fred Searles, Jr.)

of the defendant, in which case there would be a turning.

Mr. COLBY.—Will you label that with an 8, that line that you put on?

A. There are in this immediate vicinity other gouges, one passing right through the Station 320-B and another one through Station 320, and another one in the same adit a little northerly of the showing of that adit on this map. These gouges are all comparable, but the gouge at B is the heavier gouge. I did not think of that as being anything different from a small postmineral fault along the footwall of the vein, a gouge on a footwall or hanging wall being a common thing in this district and in all districts on veins.

Now, if this gouge which may be traced clearly for some distance lying right on the footwall of the vein exposed at 327 and beyond the limits of that 10 scale map for some distance further on the footwall of the vein, if that gouge is also represented in the drift along 331, there is a very decided turn in the gouge itself, and I would like to point that out, because it seems to me that it shows that the turn in that vein is not referable to the drag on a fault because the fault itself turns. It is true that when veins come against large faults we often have them turn off parallel to the fault and exhibiting a curvature and dragged toward it, but in this instance the fault itself is curved, the gouge is curved, and to my mind the vein has dragged the fault. That is to say, [496] the

(Testimony of Fred Searles, Jr.)

gouge and slip there represents nothing more than a little postmineral rubbing along the vein where the vein is curved, so that the fault is curved following the vein.

Now, certainly either that is the case or the fault branches and crosses the adit where shown by the blue line immediately northeast of 64-C where a gouge crosses the adit. If that be the line of any considerable fault, it may easily be seen from this fault. The fault, if it continued, would have to cross either the No. 1 tunnel or the Pearl tunnel.

Q. Just point to those and show—

A. The line of that fault in that case would be about as I now hold my pointer, and it is obvious that that fault could not escape passing through either the No. 1 tunnel or the No. 2 Pearl tunnel or faulting the No. 4 vein.

While I have made no especial search for that fault in any of those workings, because, frankly it never occurred to me that such a fault could be supposed to exist, I have mapped those workings with sufficient care, so that if any large fault making a stress comparable to what would be expected from a fault of the magnitude of 100 feet occurred, I certainly would have seen it, and I think I can testify that no fault of that magnitude crosses those workings. [497]

Q. Is there a fault of any considerable magnitude across either of these workings? A. No, sir.

Q. Go ahead.

A. Further, it is very plain from the model, Ex-

(Testimony of Fred Searles, Jr.)

hibit 29, that this fault would have of necessity, if continued, faulted the discovery vein. And, while the discovery vein is not a very large matter, it is traceable and it is very certain indeed that no fault of considerable magnitude crosses it within the limits of the Lone Pine claim. The Surprise fault could not possibly avoid faulting that discovery vein, unless it had a turn in either its dip or strike of at least 90 degrees.

Q. Could a fault of the magnitude described, over 100 feet vertical throw, die out in the short distance between that No. 2 working where our friends upon the other side have identified it, and the discovery vein?

A. In all the experience I have had with faults, in this ground and any other ground, I have never known of a fault with a displacement as great at 100 feet, to die out as rapidly as that, unless it were cut off by some other fault, the existence of which I have no knowledge of in this ground.

Q. Is that all?

A. In that connection, I might describe the fault which cuts the Black Tail vein right at the stope labeled "Black Tail Stope," as platted yellow on that model, Exhibit 29. That fault is clearly shown at the head of the Black Tail winze. It has a displacement not to exceed 20 feet. The Black Tail vein on each side of it being plainly discernible, [498] so that the amount of displacement can be known. That fault has only a displacement of 20 feet, yet it is an exceedingly well-marked feature in

(Testimony of Fred Searles, Jr.)

this ground. It may be seen at the drift about 150 feet long, which has been dug on it. It has attracted the attention of the miners and if I might be allowed to speculate as Mr. Wiley did, about the workings under water, which I have not seen, it certainly seems likely that the principal part of those workings have also been done on that same fault. That is, the extension of this working is exactly in line with its strike and dip. Now, I was interested enough in that fault to examine and follow it on its strike or to examine the ground in the direction of its projection to the southwest into the Surprise mine, and there is in the Surprise mine, exactly in line with that fault, a fault which cuts and displaces the Pearl-Surprise vein, a distance almost exactly the same as that shown on the Black Tail vein where this fault cuts it; and we ran a crosscut on the southerly side of the fault which shows there and picked up the vein displaced 20 feet and developed 100 feet of twenty dollar ore. So that it is my opinion that that fault at least does not stop against the Pearl-Surprise vein, but cuts it, displaces it; and I am certain that a fault which winds up with it and is parallel to it on a different strike does do that.

Q. Does that show that these faults in this territory do not die out, but have some continuity?

A. It shows that that fault does not, and I would be very much surprised to find a fault with a displacement five times as great as that dying out in a short distance. Now, I [499] might say one

(Testimony of Fred Searles, Jr.)

word further about gouges which occur along the course of veins. They are an extremely common feature. Nearly all veins have them and they represent often not any important movement but simply a little rubbing or slight shock; because a vein in the ground is like a crack in a plate—it is a plane of weakness, and any stress which comes upon that ground is apt to produce a little yielding or motion along the wall of the vein. And that, I fully believe, is the cause of the attrition product and gouge which are shown on the walls of the vein in the area mentioned in the No. 2 tunnel. There is one effect which can be produced by a strike fault of that kind, which may on the surface of it look rather important. For instance, if we consider the stope which departs from the hanging-wall of the Black Tail vein on No. 1 tunnel level, shown as a branching stope in this model exhibit 29—and I might say incidentally that that stope is incorrectly shown on this model, because up to approximately the limit of it it should not be shown with a gap which occurs here between the two stopes, that is to say, that way, and the stope which has received it, come right up against the main Black Tail vein so that you can jump off of one stope onto the other. Now, suppose that there were a slight motion producing a very little gouge along that hanging-wall of the main Black Tail vein at that point, even though the displacement were very slight indeed, it might produce the apparent effect of a cutoff on that vein. I see here Plaintiff's Exhibit 18, a

(Testimony of Fred Searles, Jr.)

sketch which I understand is intended to represent that point, and which represents it rather diagrammatically. Suppose that along the main Black Tail vein shown here, there were produced a gouge by a relatively [500] small movement or along the trench, to the right, there were produced a gouge by a little motion on the hanging-wall so that we have, where the blue lines are now shown a gouge. We might have these branch veins which were simply branches from that vein, coming right up to it and curving around, after the production of that gouge, apparently to the right on the gouge; and from the local appearance right there, one would be unable to say that that was not a feature which had been faulted some distance along there because one would see the strands of this quartz abutting and perhaps curved along as though dragged on that wall. And still that might not be the real explanation of it. Now, sometimes it is rather difficult, to tell where two veins come together and there is a gouge on the wall of them, whether these veins have joined and simply separated by the walls, or whether they have been faulted. I might say that is one of the intricacies which cause so much trouble in Butte, and when we do have trouble of that kind and wish to determine what is the cause, we try to find out the effect of that gouge on any other features where it intersects in such a manner that the displacement can be measured so that where, as in this instance, we have a similar case of a gouge following along the wall and intersecting so slight

(Testimony of Fred Searles, Jr.)

an angle that it becomes difficult to say what the displacement is of it, if it has any, the thing that I would do as a geologist would be to try to follow that gouge and see where it cuts and intersects, in order to have some datum for measuring its displacement. And, in following that gouge where—following the line of it, I mean, which [501] I think represents a fault of small magnitude—I think so because I can't find it faulting any of these continuous features farther to the north or disturbing in the slightest degree the Pearl-Surprise vein which runs out the other way—and I think it entirely improbable that a fault with the displacement which is postulated for this one could exist in the ground without disturbing features either to one side of it or the other.

Q. Mr. Searles, did you examine the lower working here which my friends upon the other side have spoken of as the "Black Tail Vein at 64-C"?

A. I have examined the short drift there; I have never examined the winze. In fact, knew nothing about the winze, except that there was a hole full of water there, until I heard the testimony in this case.

Q. In your judgment, is that a part of the Black Tail vein? A. I think it is; yes.

Q. Just explain why you think so.

A. I think that that represents a little branch of the Black Tail vein similar to the other branches that we know of and even in the limits of the modern development shown upon it there, it appears to be

(Testimony of Fred Searles, Jr.)

stronger as one approaches the south vein and to diminish in strength as one goes to the face of the little drift.

Q. Is there any justification in your judgment for the attempt to correlate that with the little vein found in Pearl tunnel No. 2?

A. I never thought of a correlation, but I would be [502] skeptical about it, particularly because to the best of my recollection the surface above that on its dip for a portion of the distance between is not covered by wash but is exposed, and I have no recollection—in fact, I think I can say quite positively that there is no exposure of any vein of any magnitude along the strike of it. [503]

Q. In the working which has been referred to as 331½, can you get a strike of that quartz there in any manner? A. Yes.

Q. How?

A. The way I did it was to take a tape-line across the back of the drift where the quartz shows and measure the direction of the tape-line when stretched between two points at the same level on the quartz.

Q. As you enter that drift on the right-hand side, where is the quartz?

A. As you pass Station 331½, the quartz is down near the bottom of the drift, exposed in the side.

Mr. COLBY.—I thought I asked Mr. Searles about that quartz. In which working is he talking about?

Mr. GRAY.—About this working here.

Mr. COLBY.—I asked him particularly about

(Testimony of Fred Searles, Jr.)

that. I am pretty sure of it, didn't I, Mr. Searles?

A. My recollection is that I testified about that.

The COURT.—That is my impression.

Mr. GRAY.—What I want to get at, he testified that there was quartz there. What I want to show is just where this quartz is near the place of that working.

A. The main body of the quartz near the face of the working is overhead. At the present time it is practically obscured by timbering, but unless the timbering is changed since I left there it can still be seen. It is a considerable body of quartz immediately underlying the wash. [504]

It is overhead and back of the drift, and it is continuous as a streak of quartz with the quartz which shows near Station 331½ near the floor. In the face of that drift there is also quartz, but it has not that streak. There are two streaks shown. One part was upon the face just parallel in strike to the one in back and another small streak which cuts diagonally across it.

Q. That shows that the working is cutting diagonally across the quartz which is exposed there, doesn't it?

A. I don't see how there can be any question about it.

Cross-examination.

(By Mr. COLBY.)

Q. Mr. Searles, you have stated that it would be rather uncommon for a fault to turn either in dip or strike to an angle of nearly 90 degrees?

(Testimony of Fred Searles, Jr.)

A. I don't think I stated that.

Q. Well, do you desire to state that?

A. I think it is uncommon, yes, for a fault of considerable magnitude.

Q. Do you recall the Siebert fault in connection with the Jim Butler vein? A. Yes.

Q. That had some very remarkable convolutions, didn't it, and windings in its course?

A. I think you have it mixed up. The Jim Butler vein, the fault was fairly straight.

Q. Didn't we start a raise there in order to find the fault above the vein, and found the fault turning at a [505] very sharp angle before we reached it?

A. Well, I certainly cannot remember any sharp angles in it.

Q. How do faults ordinarily die out?

A. I think the most common method of their death is by dissipation.

Q. That is frequently the difficulty with a good many people, but are there other ways in which faults die out?

A. Yes, sometimes faults die out without becoming dissipated into several strands by being faults in which there is sort of a scissors movement.

Q. A rotational movement?

A. A rotational movement; yes, sir.

Q. And is it not also a fact that faults frequently die out or lose their identity by meeting other faults and being turned off in the direction of other faults?

A. You mean being faulted by other faults?

(Testimony of Fred Searles, Jr.)

Q. Yes, and the motion going along on the planes of other faults because they are planes of weakness?

A. Yes, I think that perhaps is not so very common, but it certainly occurs.

Q. And faults also die out by the fingering out or branching out sometimes in two or more branches?

A. That is what I mean by dissipation. But I might add that I never knew of the early death of any 100 foot fault by any one of these methods within the distance in question here. [506]

Q. How about this fault that you have described in the Black Tail workings intersecting the vein? That was which fault which you described in detail?

A. The one I was concerned with chiefly was the one at the head of the Black Tail winze.

Q. Referring to that fault, what was the direction of that movement?

A. The southerly side dropped.

Q. And what is the total displacement in the direction of movement? A. I think about 20 feet.

Q. How would you determine that?

A. What I was thinking of was the displacement, the shortest displacement perpendicular to the dip of the vein. If that were a dip shift fault, the actual displacement between two points formerly adjacent would be that same distance times the cosign of the dip.

Q. In other words, to determine the actual displacement where you have a homogenous rock, you would take the two segments of the vein which you have, and you would take the data upon which you

(Testimony of Fred Searles, Jr.)

base your measurements and the direction of motion as shown by the movement of the fault, would you not? A. Yes, sir.

Q. Where you have a homogenous rock of that sort and a fault, what is the best test for measuring the movement along the fault?

A. Well, the exact determination of movement on a fault of homogenous rock would depend on determining the displacement [507] on two recognizable features, that is two recognizable planes which were not parallel, either dykes or veins or something to measure by.

Q. Something that is known and has been displaced? A. That is correct.

Q. And if you should have more than two features to check on, that would be even a stronger basis upon which to found your conclusion as to the throw of the fault, would it not?

A. Yes; the more recognizable planes found parallel with a fault, parallel upon parallel that the fault intersects and which can be carefully measured and their displacement exactly determined, the more exact information you have as to the displacement on that fault.

Redirect Examination.

(By Mr. GRAY.)

Q. I suppose you do not do that by reasoning, though. You do it by actual measurement?

A. That is, of course, worthless unless the premises are sound.

(Testimony of Thomas Ryan.)

The COURT.—I think that is self-evident.

Witness excused.

Thereupon an adjournment was taken until 10 o'clock A. M. Friday, August 27, 1920. [508]

Testimony of Thomas Ryan, for Plaintiff (In Rebuttal).

THOMAS RYAN, called and sworn as a witness in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. GRAY.)

Q. What is your name? A. Thomas Ryan.

Q. And you reside in Spokane? A. Yes.

Q. You were one of the locators of the Lone Pine claim? A. I am.

Q. You and Mr. Creasor located it?

A. Yes, sir.

Q. Do you remember the date?

A. No, I do not exactly.

Q. It was in the early spring, in the month of February—I will assist you, in the month of February of 1896? A. 1896, yes.

Q. Would you know how it looks on the map?

A. No, sir, I have not seen it on the map. I have seen it on the ground.

Q. Do you remember where Eureka Gulch is?

A. No, sir.

Q. Well, you helped to locate the Pearl and the Surprise claims? A. Yes, sir.

Q. And the Last Chance claim? A. Yes, sir.
[509]

(Testimony of Thomas Ryan.)

Q. Come over here and I will show you the claims. We are all agreed that this is the way they lay now. Do you know the Black Tail claim too?

A. Well, I was on the Black Tail ground.

Q. This is the Black Tail, and here is the Lone Pine, and over to the east is the Last Chance, and over to the west is the Pearl and the Surprise. Does that look all right to you?

A. I could not say. I am not educated enough to understand the map.

Q. Now, Mr. Ryan, you remember where you saw croppings? Were you there at the time the claim was located?

A. I was on the ground the time the claim was located.

Q. Who made the discovery on the Lone Pine?

A. We were both together on the Lone Pine.

Q. When you made the discovery? A. Yes, sir.

Q. Where did you find this vein cropping first?

A. Well, sir, we found it on where the discovery claim was located, the Lone Pine claim.

Q. You were both up there together?

A. Both came there about the same time.

Q. Do you remember seeing a cropping there, right above this creek that ran across the claim?

A. That little draw that came down between the Black Tail and the Lone Pine?

Q. Yes.

A. Yes, sir.

Q. Did you see that cropping at that time? [510]

A. Which cropping?

(Testimony of Thomas Ryan.)

Q. The cropping of the vein, a quartz cropping, just up the hill to the north of that little draw?

A. Yes, on the Lone Pine side?

Q. Yes. A. Yes, sir.

Q. You saw that at that time? A. Yes.

Q. That quartz cropping stood of the ground a good ways, didn't it?

A. Yes, sir; and I covered it with the north end of the Last Chance stake.

Q. You did some work there at that cropping, didn't you, a short time later, you and Mr. Creasor?

A. I don't know whether Mr. Creasor was with him. I looked around the spot different places. I could not tell you exactly, because it has been quite a number of years, about 24 years.

Q. But there was some quartz cropping, on which you did some work?

A. There was some quartz cropping back of the blacksmith-shop. The ground was patented.

Q. How far from the blacksmith-shop?

A. I don't know exactly.

Q. Just a little ways? A. Yes, sir.

Q. You saw the patent plat. You would know it on the patent, wouldn't you? [511]

A. No, I have never seen the patent.

Q. Near a blacksmith-shop, was it?

A. Near the northeast of the blacksmith-shop.

Q. Right near the blacksmith-shop, anyway?

A. Yes, sir.

Q. And that cropping you saw when you located the Lone Pine claim?

(Testimony of Thomas Ryan.)

A. When I located the Last Chance and going across with the Last Chance line, I seen the cropping and I ran my—located my stake in on the Lone Pine ground to make a lap.

Q. You located the Last Chance the day after you located the Lone Pine?

A. I could not tell you whether I located the Last Chance the day after, or the Surprise.

Q. But it was about the same day?

A. About the same day.

Q. Now, when you went back there, that is where you did the first picking around at that quartz cropping near the blacksmith-shop?

A. No, not the first time.

Q. Where did you do the picking the first time?

A. I done picking over here. I don't know whether it was the first time, or what time it was; I could not say.

Q. You did do some work on that claim, on this quartz cropping, near where the blacksmith-shop was?

A. I did some picking there, but I could not say positively how much work I done.

Q. I am not asking you how much you did. Now, when you located the Lone Pine claim you located it northerly and [512] southerly, didn't you?

A. That is the way I thought it was.

Q. What made you think so, Mr. Ryan?

A. Because that is the way the ledges run.

Q. Did you see an outcropping there?

A. I did, and I located the Last Chance there.

(Testimony of Thomas Ryan.)

Q. That would be the day after you located the other? A. I don't remember.

Q. On the day you located the Last Chance, anyway, you could see the croppings at various places running up and down? A, I could, sir.

Q. In a northerly and southerly direction?

A. I would not say.

Q. The way you located the claim, anyway?

A. Yes, the way I located the claim, I located it to take that in.

Q. You knew where the Black Tail was at that time?

A. I knew the Black Tail afterwards. I didn't know whether it was the Black Tail at the time or not.

Q. But you knew there was such a claim over there? A. Yes, sir; I seen some stakes there.

Q. Before you located the Lone Pine?

A. No, I won't say that, because we located the Iron Mast first, and I think another claim south of that which is called the Iron Clad, I am not positive, and then went to the northwest stake of the Iron Mast, and then swung and came down there by Mud Lake or by Knob Hill, I would not be sure, and came around, and I don't know but what we might have went to the Tom Thumb mine, and coming back later, [513] we both struck on to the croppings of the Lone Pine, and there was a tree there, and we marked on the tree.

Q. Did you see Mr. Welty up there that day, the man who owned the Black Tail claim?

(Testimony of Thomas Ryan.)

A. I don't remember of seeing him that day.

Q. Did you see him the next day when you located the Last Chance?

A. Well, when I located the Last Chance, there was no dispute between the Last Chance and the Black Tail. It was between the McCawber and the Last Chance.

Q. Now, Mr. Ryan, you knew Mr. J. C. Ralston and have known him for a long time. A. Yes.

Q. You know Mr. Wourms, this gentleman standing right here?

A. I don't remember. I might have seen him.

Q. Don't you remember, up in the Davenport Hotel a few months ago, that you told Mr. Wourms and Mr. Ralston in my presence that the first quartz you found on the Lone Pine claim was just above the creek where your blacksmith-shop afterwards was placed?

A. Where the first quartz was found, where the Lone Pine tree, or the Lone tree, I don't know whether it was a pine or a fir, because I didn't examine it closely at that time.

Q. Didn't you tell us that you followed float on up to the top of the hill where the Lone Pine Tree was, and then followed float clear on up to the end-line?

A. No, sir; not to my knowledge.

Q. You did not tell us that?

A. I don't believe I did. [514]

Q. There is a strong cropping of quartz down here near where your blacksmith-shop ultimately was placed?

(Testimony of Thomas Ryan.)

A. I don't know how much quartz there is. There is quite a showing.

Q. And that was visible to you when you located the claim?

A. When I located the Last Chance?

Q. That would be on the 29th?

A. Whatever date it was, I don't know.

Q. Was that the day you staked the Lone Pine?

A. Well, now, I wouldn't be positive. I wouldn't say whether I had put any stakes on at the time we discovered the Lone Pine. Mr. Creasor made the remark, "We are on quartz," and I says, "yes."

Q. Anyway, the day you located the Last Chance, you knew of this quartz outcrop, near the place where the blacksmith-shop afterwards was?

A. I crossed up and put my stakes on the Last Chance.

Cross-examination.

(By Mr. COLBY.)

Q. The Lone Pine was already located at that time? A. Yes, sir; at that time.

Q. That was at the time you saw these croppings first back of the blacksmith-shop, the Lone Pine had already been located, hadn't it? A. What?

Q. At the time you saw these croppings near the blacksmith-shop, the Lone Pine had already been located? [515]

A. Why, certainly the Lone Pine had been located.

Q. The location of the Lone Pine was made at a little tree, you say?

A. I don't know whether it was a pine or a fir tree.

(Testimony of Thomas Ryan.)

Q. How high was it where it was cut off?

A. It was cut off pretty high. I couldn't tell you the exact height.

Q. And right close to that did you see any quartz?

A. Did I see any quartz—I was standing on quartz.

Q. So that your discovery was right near that little tree?

A. Yes, sir; the discovery was right near that little tree.

Q. Your notice was put on the tree?

A. There was notice put on the tree.

Q. Mr. Creasor wrote the notice on the tree?

A. I don't know whether he wrote the notice that night or not. I can't say positively.

Q. He was the one that cut down the tree?

A. I wouldn't swear to that, whether it was him or me.

Q. Your memory is not there on that point?

A. Not on that point, sir, it is not. Mr. Creasor was more on the ground at the present time because he was wrapped up in the Lone Pine.

Q. He was wrapped up in the Lone Pine? How was he wrapped up in it?

A. Well, he thought a great deal of it. [516]

Q. Did you ever find any other veins there on the Lone Pine besides your discovery vein?

A. Did I ever find any?

Q. Yes.

A. Spurs and fibres running all through.

Q. When did you do your first staking—or mining, on it? A. In what way? On the Lone Pine?

(Testimony of Thomas Ryan.)

Q. In the way of sinking a shaft, or doing any work. A. I don't remember whether it was—

Q. Was that right away or some time after?

A. It was quite a while after, I think.

Q. About how long would you say?

A. I couldn't say, sir.

Q. You are quite sure though that you had not seen this big vein here at the time you made your location?

A. That big vein do you have reference to?

Q. The main vein. A. Where is the main vein?

Q. Don't you know the veins up there?

A. I know the veins, but there is so many veins I don't know what you call the main veins.

The COURT.—The one that has been worked.

Mr. COLBY.—The one that has been worked most. A. The Lone Pine?

Q. Yes.

A. When I located the Last Chance and Surprise [517] I bonded my interest to Mr. Jim Clark and then Mr. Clark had done the work on the mine and he wanted Mr. Creasor and a man by the name of—he was an assayer—come on work with Mr. Creasor, and I was working on the Republic. I had nothing to say. Jimmie Clark come in and wanted me to go to work on the Lone Pine, and I told him no that I had nothing to do with it, that I had bonded my interest to Mr. Jim Clark.

The COURT.—We don't care for that.

Q. Mr. Creasor had more to do with the Lone Pine and knew more about it than you did, didn't he? A. Yes, sir.

(Testimony of Thomas Ryan.)

The COURT.—Q. What way did you go up there when you located it?

A. Well, sir, I think—I wouldn't be positive, Judge, I think it was located—I think we located the south claim *if* the Iron Mast—

The COURT.—Where is that, what direction is it?

A. That is south of the Iron Mast. I wouldn't be positive whether they call it that or what. And then after putting up stakes on that—we went down and come around the curve—I couldn't say positive whether we went to the Tom Thumb or not, but when we came back it was coming on towards evening when we struck into the croppings of the Lone Pine, where that lone tree was. Whether we staked it that day or the next day, I couldn't say.

Mr. GRAY.—You are still interested in the [518] Lone Pine-Surprise? A. I am, sir.

Mr. COLBY.—I think your Honor can see plainly why neither of us called Mr. Ryan; he is so hazy.

(Whereupon Court adjourned.) [519]

In the United States District Court, Eastern District
of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,

Defendant.

**Stipulation Re Insertion of Testimony in Question
and Answer Form in Statement.**

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that in the preparation of the record upon appeal in the above case the full testimony of the witnesses in question and answer form shall be embodied in said record on appeal instead of a narrated statement of all the testimony or of a portion thereof, and that in the preparation of a statement herein, the full record of the testimony in question and answer form shall be embodied in said statement in lieu of narrated testimony.

This stipulation is made in the light of technical features of the case and in the light of the various questions arising from the testimony; and this stipulation is further made subject to the consent of the Judge of the above-entitled court.

Dated this 4th day of May, 1921.

JOHN H. WOURMS,
JOHN P. GRAY,
Attorneys for Plaintiff.
WM. E. COLBY,
FRED S. DUGGAN,
Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District
of Washington. May 16, 1921. W. H. Hare, Clerk.
[520]

In the United States District Court, Eastern District
of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,

Defendant.

**Order Approving Stipulation Re Insertion of Testi-
mony in Question and Answer Form in State-
ment.**

Upon reading the foregoing stipulation, and being familiar with the record in this cause and believing that in the light of the technical features of the case and the various questions arising from the testimony that it is desirable and of advantage that the full testimony in question and answer form may be embodied in the record in lieu of a statement in narrative form, the foregoing stipulation is approved, and I hereby consent and approve of the embodiment in said record on appeal of the testimony in question and answer form.

Dated this 9th day of May, 1921.

FRANK H. RUDKIN,
Judge.

Filed in the U. S. District Court, Eastern District
of Washington. May 16, 1921. W. H. Hare, Clerk.
[521]

In the United States District Court, Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,

Defendant.

**Stipulation Settling and Approving Statement of
Evidence.**

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the annexed statement of the evidence may by the Court be settled, allowed and approved as correct.

Dated this 9th day of May, 1921.

JOHN H. WOURMS,

JOHN P. GRAY,

Attorneys for Plaintiff.

WM. E. COLBY,

FRED S. DUGGAN,

Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. May 16, 1921. W. H. Hare, Clerk.

[522]

In the United States District Court, Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,

Defendant.

Order Settling Statement of Evidence.

The foregoing statement of the evidence and proceedings in the above cause paged from 1 to 519, inclusive, is in due time presented to the Judge of this court.

It appears that the parties have stipulated that the record be prepared in question and answer form and the Court has approved of such stipulation because of the nature of the case. And the undersigned Judge does hereby certify that the foregoing statement contains all of the evidence introduced upon the trial of said action and all of the proceedings had on said trial and the same is approved and settled as a true, complete and properly prepared statement of the evidence and proceedings in said case, excepting only the exhibits, and it is ordered that all exhibits referred to in said statement shall be deemed a part hereof the same as if fully set forth herein, to be separately certified by the clerk of this

court and upon any appeal to be by him transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 9th day of May, 1921.

FRANK H. RUDKIN,
Judge.

Filed in the U. S. District Court, Eastern District of Washington. May 16, 1921. W. H. Hare, Clerk.
[523]

In the United States District Court, Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,
Defendant.

Stipulation Re Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that all exhibits in said cause may in their original form be considered a part of the statement of the evidence and the proceedings of the court to be settled by the Judge of the above-entitled court, and that all of said exhibits of whatsoever kind and character may, in their original form, be certified by the clerk of the above-entitled court to the clerk of the Circuit Court of

Appeals of the United States for the Ninth Circuit, as a part of the record on appeal in the above-entitled action, said exhibits to be considered by the United States Circuit Court of Appeals for the Ninth Circuit, aforesaid, in the consideration of the appeal in the above-entitled action.

Dated this 4th day of May, 1921.

JOHN H. WOURMS,
JOHN P. GRAY,
Attorneys for Plaintiff.
WM. E. COLBY,
FRED S. DUGGAN,
Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. May 16, 1921. W. H. Hare, Clerk.
[524]

In the United States District Court, Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,
Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now the plaintiff and files the following assignment of errors upon which it will rely upon the

prosecution of its appeal from the decree made by this Honorable Court on the 14th day of December, 1920, in the above-entitled cause:

I.

The Court erred in not holding that the Black Tail vein within the Lone Pine claim was a primary vein or original vein.

II.

The Court erred in finding, holding and deciding that the Black Tail vein within the Lone Pine claim is a secondary or incidental vein.

III.

The Court erred in holding and deciding that there could be but one primary, original or principal vein within a mining claim.

IV.

The Court erred in not holding that the Black Tail vein, at its top or apex, entered the south end-line of the Lone Pine claim and passed out of the east side-line thereof at a point 589 feet from the southeast corner of said claim, and that the vein, being known at the date of location of the Lone Pine claim, the extralateral rights thereon became fixed and the end-lines of the claim as located became the end-lines for extralateral rights upon all veins.
[525]

V.

The Court erred in not holding and deciding that the Black Tail vein entered the south end-line of the Lone Pine claim and departed therefrom at a point 589 feet from the southeast corner.

VI.

The Court erred in not holding that where a vein,

known at the date of discovery and location of a claim, extends through one end-line of that claim that the extralateral rights upon that vein and all other veins are controlled by the end-lines of the claim as located.

VII.

The Court erred in finding, holding and deciding that the defendant was entitled to any part of the Black Tail or No. 2 lode, vein or ledge beneath the surface of the Last Chance claim and between vertical planes, one drawn downward through the south end-line of the Lone Pine claim extended in its own direction easterly, and the other parallel thereto and passing through the east side-line of said Lone Pine claim at a point 589 feet from the southeast corner thereof, measured along said side-line, and in not decreeing said vein within said planes beneath the said Last Chance claim to belong to this plaintiff.

VIII.

The Court erred in making and entering its decree herein in favor of the defendant and in dismissing the bill of complaint of the plaintiff.

IX.

The Court erred in not holding, finding and deciding that the ore bodies in controversy beneath the surface of the Last Chance claim were a part of the Black Tail vein, the top or apex of which was within the Lone Pine claim and that the said claim was so located with reference to the said vein that the said ore bodies were a part of the Lone Pine claim and the property of the plaintiff. [526]

WHEREFORE, the plaintiff, Northport Smelt-

ing and Refining Company, prays that the said judgment and decree of the said District Court of the United States for the Eastern District of Washington, Northern Division, be reversed.

JOHN H. WOURMS,

JOHN P. GRAY,

Attorneys for Plaintiff.

Service of the foregoing assignment of errors admitted and a copy thereof received this 4th day of May, 1921.

WM. E. COLBY,

FRED S. DUGGAN,

Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. May 16, 1921. W. H. Hare, Clerk.
[527]

In the United States District Court, Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,

Defendant.

Petition for Appeal and Order Allowing Same.

To the Honorable FRANK H. RUDKIN, Judge of
the United States District Court, Eastern Dis-
trict of Washington, Northern Division.

The above-named plaintiff, Northport Smelting and Refining Company, considering itself aggrieved by the decree entered in the above-entitled cause on the 14th day of December, 1920, in the above-entitled court, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that an appeal be allowed and a citation issued as provided by law, and that a transcript, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner further prays that proper order touching the security to be required in order to perfect its appeal be made, and that upon the filing of a bond in such sum as shall be provided for in the order attached hereto that an order of supersedeas be made herein, and the filing of the bond acknowledged as a supersedeas.

JOHN H. WOURMS,

JOHN P. GRAY,

Attorneys for Plaintiff. [528]

ORDER.

The foregoing petition is hereby granted and the appeal is allowed in the above-entitled cause, and in pursuance of the written stipulation filed herein, it is ORDERED that the amount of the bond on appeal shall be fixed at the sum of Five Hundred Dollars

(\$500), and it is further ordered that said appeal shall operate as a supersedeas, staying execution for costs allowed upon the appellant filing a bond in the sum of One Thousand Dollars (\$1000), with sufficient surety or sureties.

FRANK H. RUDKIN,
Judge.

Service of the foregoing petition for appeal and allowance admitted, and a copy thereof received this 4th day of May, 1921.

WM. E. COLBY,
FRED S. DUGGAN,
Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. May 16, 1921. W. H. Hare, Clerk.
[529]

THE AETNA CASUALTY AND SURETY COMPANY,

Hartford, Connecticut.

MORGAN G. BULKELEY, President.

In the United States District Court, Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING & REFINING COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That, we, Northport Smelting and Refining Company, a corporation, as principal, and Aetna Casualty and Surety Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Connecticut, having its principal office in Hartford, Connecticut, as surety, are held and firmly bound unto the Lone Pine-Surprise Consolidated Mines Company, a corporation, in the sum of Five Hundred (\$500.00) Dollars, lawful money of the United States of America, to be paid to it and to its successors and assigns; to which payment, well and truly be made, we bind ourselves and each of us jointly and severally, and each of our successors and assigns by these present.

Sealed with our seals and dated this 9th day of May, 1921.

WHEREAS, the above-named Northport Smelting and Refining Company has prosecuted or is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse a decree made and entered in said cause in the District Court of the United States for the Eastern District of Washington, Northern Division, on the fourteenth day of December, 1920, in favor of the defendant in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this

obligation shall be void; otherwise to remain in full force and effect.

NORTHPORT SMELTING AND REFIN-
ING CO.

By JEROME J. DAY,
President,

Principal.

[Seal]

Attest: EUGENE R. DAY,

Secretary.

AETNA CASUALTY AND SURETY COM-
PANY,

By FRANCIS E. POPE,
Its Resident Vice-President,

Surety.

[Seal]

Attest: E. P. GABRIEL,

Its Resident Assistant Secretary. [530]

State of Washington,
County of Spokane,—ss.

On this 9th day of May, 1921, before me, G. E. Reed, a notary public in and for the state aforesaid, personally appeared Francis E. Pope and E. P. Gabriel, known to me to be the resident vice-president and resident assistant secretary respectively of the corporation that executed the foregoing instrument and acknowledged to me that such corporation executed the same; that they know the seal of such corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by the order of the board of directors of said company; that they signed their names thereto by like order; that the said company has been duly licensed by the insurance commissioner of the State of Washington to transact

business in the State of Washington and is authorized by law of the State of Washington to become sole surety upon bonds.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of Spokane, State of Washington, this the day and year in this certificate first above written.

[Seal]

G. E. REED,

Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

The premium on this bond is \$10.00 and requires and has attached a documentary stamp of 10¢, being one per cent of the premium in accordance with Title VIII, Schedule A, Paragraph 2, of the Federal War Revenue Act, approved by the President October 3, 1917.

Approved May 17, 1921.

FRANK H. RUDKIN,

Judge.

Service of the foregoing bond on appeal, and the receipt of one true copy thereof, is hereby admitted and acknowledged this 9th day of May, 1921.

WM. E. COLBY,

FRED S. DUGGAN,

Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. May 16, 1921. W. H. Hare, Clerk.
[531]

THE AETNA CASUALTY AND SURETY COM-
PANY,

Hartford, Connecticut.

MORGAN G. BULKELEY, President.

In the United States District Court, Eastern Dis-
trict of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,

Defendant.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, Northport Smelting and Refining Com-
pany, a corporation, as principal, and Aetna Casualty
and Surety Company, a corporation, duly organized
and existing under and by virtue of the laws of the
State of Connecticut, having its principal office in
Hartford, Connecticut, as Surety, are held and firmly
bound unto the Lone Pine-Surprise Consolidated
Mines Company, a corporation, in the sum of One
Thousand (\$1000.00) Dollars, lawful money of the
United States of America, to be paid to it and to its
successors and assigns; to which payment, well and

truly to be made, we bind ourselves and each of us jointly and severally, and each of our successors and assigns by these presents.

Sealed with our seals and dated this 9th day of May, 1921.

WHEREAS, the above-named Northport Smelting and Refining Company has prosecuted or is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse a decree made and entered in said cause in the District Court of the United States for the Eastern District of Washington, Northern Division, on the fourteenth day of December, 1920, in favor of the defendant in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff shall prosecute its said appeal to effect and answer all damages and costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

It is expressly agreed by the Aetna Casualty and Surety Company, the surety above-named, that in case of a breach of any condition of this bond, the Court may, upon notice of not less than thirty days to said Aetna Casualty and Surety Company, [532] proceed summarily in this action to ascertain the amount which said surety is bound to pay on account of such breach and render judgment against said

Aetna Casualty and Surety Company and award execution therefor.

NORTHPORT SMELTING AND REFIN-
ING CO.

By JEROME J. DAY,
President,
Principal.

[Seal] Attest: EUGENE R. DAY,
Secretary.

AETNA CASUALTY AND SURETY COM-
PANY,

By FRANCIS E. POPE,
Its Resident Vice-President,
Surety.

[Seal] Attest: E. P. GABRIEL,
Its Resident Assistant Secretary.

State of Washington,
County of Spokane,—ss.

On this 9th day of May, 1921, before me, G. E. Reed, a notary public in and for the state aforesaid, personally appeared Francis E. Pope and E. P. Gabriel, known to me to be the resident vice-president and resident assistant secretary respectively of the corporation that executed the foregoing instrument and acknowledged to me that such corporation executed the same; that they know the seal of such corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by the order of the board of directors of said company; that they signed their names thereto by like order; that the said company has been duly licensed by the Insurance Commissioner of the State of Washington to

transact business in the State of Washington and is authorized by law of the State of Washington to become sole surety upon bonds.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of Spokane, State of Washington, this the day and year in this certificate first above written.

[Seal]

G. E. REED,

Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

The premium on this bond is \$10.00 and requires and has attached a documentary stamp of 10¢, being one per cent of the premium in accordance with Title VIII, Schedule A, Paragraph 2 of the Federal War Revenue Act, approved by the President October 3, 1917.

Approved May 17, 1921.

FRANK H. RUDKIN,

District Judge. [533]

Service of the foregoing bond on appeal, and the receipt of one true copy thereof, is hereby admitted and acknowledged this 9th day of May, 1921.

WM. E. COLBY,

FRED S. DUGGAN,

Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. May 16, 1921. W. H. Hare, Clerk.
[534]

In the United States District Court, Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,

Defendant.

Stipulation Re Fixing Amount of Bond on Appeal.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the bond on appeal herein shall be fixed at the sum of Five Hundred Dollars (\$500), with the consent of the Court.

Dated this 4th day of May, 1921.

JOHN H. WOURMS,

JOHN P. GRAY,

Attorneys for Plaintiff.

WM. E. COLBY,

FRED S. DUGGAN,

Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. May 16, 1921. W. H. Hare, Clerk.

[535]

In the United States District Court, Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,

Defendant.

Stipulation Re Fixing Amount of Supersedeas Bond.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the supersedeas bond, staying the execution on judgment herein, shall be fixed at the sum of One Thousand Dollars (\$1000), with the consent of the Court, and that all process herein be stayed pending an appeal of the above-entitled action, but in no event shall such bond be interpreted as preserving the *status quo*.

Dated this 4th day of May, 1921.

JOHN H. WOURMS,
JOHN P. GRAY,
Attorneys for Plaintiff.
WM. E. COLBY,
FRED S. DUGGAN,
Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. May 16, 1921. W. H. Hare, Clerk.
[536]

In the United States District Court, Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,

Defendant.

Citation on Appeal.

The President of the United States to Lone Pine-Surprise Consolidated Mines Company, and to W. S. Colby and Fred S. Duggan, its Solicitors:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an appeal filed in the office of the clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein Northport Smelting and Refining Company, a corporation, is appellant, and Lone Pine-Surprise Consolidated Mines Company, a corporation, is appellee, to show cause, if any there be, why the said decree in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties on that behalf.

WITNESS the Honorable FRANK H. RUDKIN, Judge of the District Court of the United

States for the Eastern District of Washington, this 9th day of May, 1921, and of the Independence of the United States one hundred and forty-five, at the city of Spokane, State of Washington.

FRANK H. RUDKIN,
Judge.

Service of the foregoing citation on appeal acknowledged and a copy thereof received this 4th day of May, 1921.

WM. E. COLBY,
FRED S. DUGGAN,
Attorneys for Defendant. [537]

Filed in the U. S. District Court, Eastern District of Washington, May 16, 1921. W. H. Hare, Clerk.
[538]

In the United States District Court, Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,
Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,
Defendant.

Praeceptum for Preparation of Transcript on Appeal.
To the Clerk of the United States District Court for
the Eastern District of Washington:

You will please prepare a transcript on appeal

herein including all of the following papers, to wit:

Final record herein, including the bill of complaint, subpoena in equity, answer of defendant, decree, certificate of clerk.

Also include in said transcript the opinion of the Court in deciding the case, statement of evidence and proceedings, stipulation with reference to the form of the preparation of the record with order attached thereto, stipulation settling statement of the evidence, stipulation that exhibits may be certified in their original form and made a part of the record herein and a part of the statement herein.

Also all exhibits in the case, except the maps, models, photographs, drawings, tracings, blue-prints and samples.

Also assignment of errors, petition for appeal and order allowing the same, bond on appeal, supersedeas bond, stipulations with reference to the bonds, citation and acknowledgment of service, this praecipe and certificate of the clerk.

JOHN H. WOURMS,

JOHN P. GRAY,

Attorneys for Plaintiff. [539]

Service of the foregoing praecipe admitted and copy thereof received this 4th day of May, 1921.

WM. E. COLBY,

FRED S. DUGGAN,

Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. May 16, 1921. W. H. Hare, Clerk.
[540]

In the United States District Court, Eastern District of Washington, Northern Division.

No. 3255.

NORTHPORT SMELTING AND REFINING
COMPANY, a Corporation,

Plaintiff,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing typewritten pages to be a full, true, correct and complete copy of so much of the record, papers, stipulations and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of the appeal therein in the United States Circuit Court of Appeals for the Ninth Circuit as called for by praecipe of counsel of record herein, as the same remains of record and on file in the office of the clerk of said District Court; and that the same constitutes the record on appeal from order, judgment and decree of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of

Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original citation, issued in this cause.

I further certify that the cost of preparing and certifying [541] the foregoing transcript is the sum of Eighty and 35/100 (\$80.35) Dollars, and that the said sum has been paid to me by John Wourms, solicitor for complainant and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 23d day of May, 1921.

[Seal]

W. H. HARE,
Clerk. [542]

[Endorsed]: No. 3691. United States Circuit Court of Appeals for the Ninth Circuit. Northport Smelting and Refining Company, a Corporation, Appellant, vs. Lone Pine-Surprise Consolidated Mines Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed May 27, 1921.

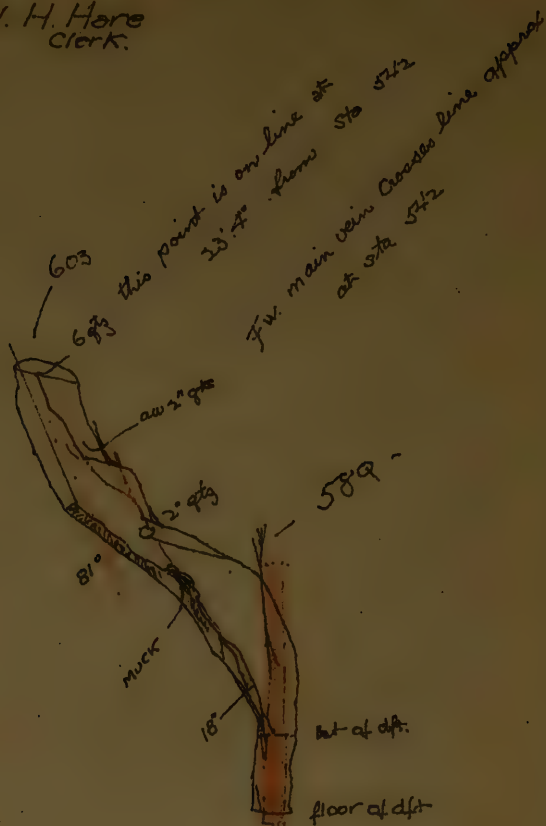
F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



Filed in the
U.S. District Court
Eastern District of Washington
Aug 27 1920
by W. H. Hore
Clerk.

Pl & 8
ad 8



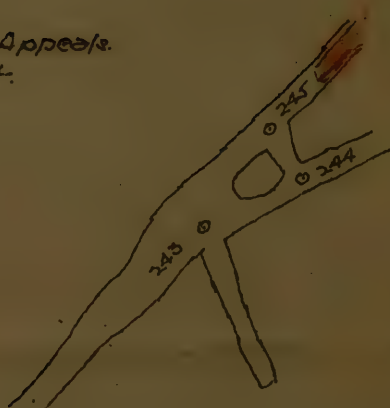
33 8
10 4
20 4

No. 3691

United States Circuit Court of Appeals
For the Ninth Circuit.

Filed
May 27 1921

F. D. MONCKTON
Clerk.





Plaintiff's Exhibit No. 11.

908545. "B." J. E. V.

4—207

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C.

May 17th, 1920.

I hereby certify that the annexed copies of papers, filed under Mineral Patent 30698, are true and literal exemplifications of the said papers on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal]

C. M. BRUCE,
Assistant Commissioner of the General Land Office.

—1

B-3

APPLICATION FOR PATENT.

State of Washington,
County of Spokane,—ss.

APPLICATION FOR PATENT FOR THE
"SURPRISE" LODE, "PEARL" LODE,
"LONE PINE" LODE, AND "LAST
CHANCE" LODE MINING CLAIMS, BE-
ING A CONSOLIDATED MINING CLAIM.
To the Register and Receiver of the U. S. Land

Office, at Spokane, Spokane County, Washington.

James Clark, whose postoffice address is Spokane, Spokane County, Washington, being duly sworn, according to law, deposes and says,—

That in virtue of a compliance with the mining rules, regulations and customs by himself and his grantors, he, the applicant for patent herein, has become the owner of, and is in the actual quiet and undisturbed possession of 1499.6 linear feet of the “Surprise” vein, lode or deposit, bearing gold, together with surface ground 521 feet in width, for the convenient working thereof as allowed by local rules and customs of miners, and for 1499.18 linear feet on the “Pearl” lode, bearing gold, with surface ground 504.6 feet in width, for the convenient working thereof, as allowed by local rules and customs of miners, and for 1468.12 linear feet of the “Lone Pine” lode, bearing gold, with surface ground 600 feet in width, for the convenient working thereof, as allowed by local rules and customs of miners, and for 1467.7 linear feet on the “Last Chance” lode, bearing gold, with surface ground 600 feet in width, for the convenient working thereof as allowed by local rules and customs of miners, said four mineral claims be-

ing applied for as a consolidated mining claim, said mineral claims, veins, lodes or deposits and surface ground being situate in Eureka Mining District, County of Stevens and State of Washington, as more particularly set forth and described in the official

field notes of survey thereof, hereto attached, dated September 11, 1897, and in the official plats of said survey, now posted conspicuously upon said mining claims or premises, a copy of which is filed herewith.

Deponent further states that the facts relative to the right of possession of himself to said mining claims, veins, lodes or deposits and surface ground, so surveyed and platted, are substantially as follows, to-wit:

The "Surprise" lode was discovered on or about the 1st day of March, 1896, by T. Ryan and Charles Robbins, who afterwards, and on or about the 8th day of March, 1896, completed a location of the same as a mining claim of the length and width aforesaid, having substantially located the same and otherwise complied with all local rules and regulations, the laws of the State of Washington and of the United States relating to mining claims.

The "Pearl" lode was discovered on or about the 10th day of July, 1896, by Philip Creasor, Charles P. Robbins and James Clark, who afterwards, and on or about the 18th day of July, 1896, completed a location of the same as a mining claim of the length and width aforesaid, having substantially located the same, and otherwise complied with all local rules and regulations, the laws of the State of Washington, and of the United States relating to mining claims.

The "Lone Pine" lode was discovered on or about the 20th day of February, 1896, by Philip Creasor, Thomas Ryan, James Clark and Charles Robbins,

who afterwards, and on or about the 28th day of

February, 1896, completed the location of the same as a mining claim, of the length and width aforesaid, having substantially located the same and otherwise complied with all local rules and regulations, the laws of the State of Washington and of the United States relating to mining claims.

The "Last Chance" lode was discovered on or about the 25th day of February, 1896, by T. Ryan, and Philip Creasor, James Clark and Charles Robbins, who afterwards, and on or about the 29th day of February, 1896, completed a location of the same as a mining claim, of the length and width aforesaid, having substantially located the same and otherwise complied with all local rules and regulations, the laws of the State of Washington and of the United States relating to mining claims.

The said locator Philip Creasor conveyed an undivided one-twelfth ($1/12$) interest in the "Pearl" claim to Charles P. Robbins on September 25, 1896; the said locator Charles P. Robbins conveyed an undivided one-fourth ($1/4$) interest in the "Surprise" claim to James Clark on September 25, 1896; the said locator Philip Creasor conveyed an undivided one-twelfth ($1/12$) interest in the "Pearl" claim to James Clark on September 25, 1896; and the said Philip Creasor, Thomas Ryan and Charles P. Robbins conveyed all their right, title and interest in and to said "Surprise," "Last Chance" and "Lone Pine" mining claims to James Clark on June 9, 1897. And the said Philip Creasor and Charles P. Robbins conveyed all their right, title and interest in and to said "Pearl" mining claim to James Clark, the appli-

cant herein, on the 6th day of July, 1897, who there-upon took possession and is the sole present owner, all of which will more fully appear by reference

—4

B-6

to the copy of original record of location and abstract of title herewith filed. The value of the labor done and improvements made upon said "Surprise" lode, "Pearl" lode, "Lone Pine" lode and "Last Chance" lode mining claims by the applicant and his grantors being equal to and exceeding the sum of Five Hundred Dollars (\$500.00).

Said improvements consist of,—On Lone Pine Lode,—the discovery, \$10.00; a tunnel 4.5' x 6.5' running 118 feet, value \$2360.00; a blacksmith shop 10 x 12', value \$50.00.

On Pearl Lode,—the discovery cut, 5 ft. wide 10 ft. deep, value \$100.00; a boarding cabin 16 x 50', value \$150.00.

On Surprise Lode,—Discovery cut, value \$25.00.

On Last Chance Lode,—Discovery cut, value \$12.00.

Other improvements on "Pearl" lode, a cabin 12 x 14 ft. Total \$2707.00. In consideration of which facts and in conformity with the provisions of Chapter Six, Title Thirty-two of the Revised Statutes of the United States, application is hereby made for and in behalf of said James Clark for a patent from the United States for the said "Surprise" lode, "Pearl" lode, "Lone Pine" lode and "Last Chance" lode mining claims, veins, lodes or deposit and the surface ground so officially surveyed and platted, the same being a consolidated mining claim.

JAMES CLARK,

Subscribed and sworn to before me this 25th day of October A. D. 1897. And I hereby certify that I consider the above deponent a credible and reliable

—5

B-7

person and the foregoing affidavit to which was attached the field notes of survey of the “Surprise” lode, “Pearl” lode, “Lone Pine” lode and “Last Chance” lode mining claims being a consolidated mining claim, was read and examined by him before his signature was affixed thereto and the oath made by him.

[Seal] GEO. M. FORSTER,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

—6

Appli.

Mineral ~~Entry~~ #25. Survey #363. Application for Patent for the “Surprise” Lode, “Pearl” Lode, “Lone Pine” Lode, and “Last Chance” Lode Mining Claims. U. S. Land Office. Spokane, Washington. Filed Oct. 27, 97. Matthew E. Logan, Register.

—7

M. E. #9 (Colville Series)

Spokane Falls, Wash.

Feby. 8/98.

by

James Clark

App. for Pat. Oct. 27/97.

“ to Pur. Feby. 7/98.

Last Chance lode claim, Lone Pine—Pearl, Surprise.
(4 lodes)

Loc. Feby. 29/96.

Pub. Nov. 4/97 to Jany. 6/98.

Black Tail Inc. 365 excludes all conflict with the Surprise & Pearl=Includes conflict with Lone Pine (363).

Quilp excludes conflict with Surprise.

Macawber includes conflict with Last Chance.

Note.—Last Chance conflict with Macawber included by both (?), Surprise conflicts with Black Tail goes to Surprise, Pearl conflicts with Black Tail goes to Pearl, Lone Pine conflicts with Black Tail goes to Black Tail (?).

1.—Ex. & describe conflict Last Chance with Macawber & Lone Pine with Black Tail (Excl. in appn. to pur.) also waiver of conflict with Black Tail.

2.—Amd. survey reqd. as per waiver above, Y.

Nov. 4

11

18

25

Dec. 2

9

16

23

30

Jany. 8

~~Philip Creaser~~ $\frac{1}{4}$

~~T. Ryan~~ $\frac{1}{4}$

~~James Clark~~ $\frac{1}{4}$

~~Charles L. Robins~~ $\frac{1}{4}$

James Clark 1

} Lone Pine & Last Chance.

Creasor	}	Pearl.
Robins		
Clark		
Ryan $\frac{1}{4}$	}	Surprise.
Robins $\frac{1}{4}$		
Clark $\frac{1}{4}$		

—8

B-1

APPLICATION TO PURCHASE.

To the Register and Receiver, United States Land Office of Spokane Falls, Washington.

The undersigned claimant, under the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, hereby applies to purchase those mining claims known as the "Surprise" lode, "Pearl" lode, "Lone Pine" lode and "Last Chance" lode, being a consolidated mining claim, located on unsurveyed Government land, designated as lot or official survey No. 363, said lot or official survey No. 363, extending 1499.6 feet in length along said "Surprise" vein or lode, 1499.18 feet in length along said "Pearl" vein or lode, 1468.12 feet in length along said "Lone Pine" vein or lode, and 1467.7 feet in length along said "Last Chance" vein or lode, but expressly excepting and excluding from this application all that portion of the ground embraced in mining claim or survey designated as lot or official survey No. 365, the "Black Tail" lode, and also all that portion of any vein or lode, the top or apex of which lies inside of said excluded ground, the ground applied for being shown by a plat made and certified

to by J. C. Ralston, Deputy United States Mineral Surveyor, hereto attached, marked "Exhibit A," and made a part of this application, said lode mining claims embracing 60.769 acres, exclusive of the area in conflict between said "Lone Pine" lode mining claim and said "Black Tail" lode mining claim, official survey No. 365, in Eureka Mining District, in the County of Stevens and State of Washington, as shown by the survey thereof, and hereby agrees to pay therefor Three Hundred and Five Dollars (\$305.00), being the legal price thereof.

—9

B-2

Dated, Spokane, Washington, February 7th, 1898.

JAMES CLARK,

I, Matthew E. Logan, Register of the Land Office at Spokane Falls, Washington, do hereby certify that the aforesaid mining claims or lodes or official survey No. 363, as applied for above, is subject to entry by the above named applicant, the area of said lode mining claims exclusive of the conflict between the "Lone Pine" lode mining claim and the "Black Tail" lode mining claim, official survey No. 365, and which is excluded, being 60769 acres, and the legal price thereof Three Hundred and Five Dollars (\$305.00).

February 7, 1898.

MATTHEW E. LOGAN,

Register.

—10

Survey No. 363. "Lone Pine" Group. Application to Purchase. U. S. Land Office, Spokane,

562 *Northport Smelting & Refining Co. vs.*

Washington. Filed Feb. 7, 98. Matthew E. Logan,
Register.

—11

B-36

(4—683.)

Mineral Survey No. 363.

Lot No. —

Spokane Land District.

Field Notes.

of the Survey of the Mining Claim of

James Clark,

Zeigler Block, Spokane, Wash.,

known as the

Lone Pine, Pearl, Surprise and Last Chance Lodes,
Eureka Mining District, Stevens County, Wash-
ington. Section unsurveyed. Township 37 N,
Range 32 E. W. M. Surveyed under instruc-
tions dated June 17th, 1897.

By JOHN C. RALSTON,

U. S. Deputy Mineral Surveyor.

Claim located: Lone Pine, Feby. 28th, 1896; Pearl,
July 18th, 1896; Surprise, March 8th, 1896; Last
Chance, Feby. 29th, 1896.

Survey commenced June 28th, 1897.

Survey completed July 1st, 1897.

U. S. Land Office. Spokane, Washington. Filed
Oct. 27—97. Matthew E. Logan, Register.

Preliminary Oaths of Assistants in Survey of Mining Claim.

We, D. Bonner and E. Henricks, do solemnly swear that we will well and faithfully execute the duties of chain carriers; that we will level the chain upon even and uneven ground and plumb the tally-pins, either by sticking or dropping the same; that we will report the true distance to all notable objects, and the true length of all lines that we assist in measuring, to the best of our skill and ability, and in accordance with instructions given us, in the survey of the Mining Claim of James Clark, known as the Surprise, Pearl, Lone Pine & Last Chance, situate in Eureka mining district, Stevens County, Washington, in Section —, Township No. —, Range No. —.

D. BONNER, Chainman.

E. HENRICKS, Chainman.

Subscribed and sworn to by the above-named persons before me this 23d day of June, 1897.

[Notary Seal]

G. O. HELPHREY,

Notary Public, Residing at Nelson, Wash.

I, A. Ritchie, do solemnly swear that I will well and truly perform the duties of axeman, in the establishment of corners and other duties, according to instructions given me and to the best of my skill and ability, in the survey of the Mining Claim of James

Clark, known as the Surprise, Pearl, Lone Pine & Last Chance, more fully described in the preceding affidavit.

A. RITCHIE, Axeman.

Subscribed and sworn to by the said A. Ritchie before me this 23d day of June, 1897.

[Notary Seal]

G. O. HELPHREY,
Notary Public, Residing at Nelson, Wash.

I,——, do solemnly swear that I will well and truly perform the duties of flagman, in the establishment of corners and other duties, according to instructions given me and to the best of my skill and ability, in the survey of the Mining Claim of ——, known as the ——, more fully described in the preceding affidavit.

——, Flagman.

Subscribed and sworn to by the said —— before me this —— day of ——, 18—.

_____.

—13

B-38

SURVEY #363.

Lone Pine, Pearl, Surprise and Last Chance Lodes.
Feet.

LONE PINE LODGE.

Beginning at Cor. No. 1 on narrow bench 60 feet above Eureka Creek, Identical with Location Cor. Location Cor. being a pine post 5x5 ins 4½ ft. above ground, marked S. W. Cor. Lone Pine Min. Claim.

A fir post 5"x5"-5 ft. long set 2 ft in ground to bed rock, with mound of earth & stones scribed 1-4-1-363 whence.

A fir tree 12" diam. blazed & scribed B. T. 1-4-1-363 brs. S. 60° 00' W. 45.3 ft.

A granite rock in place 3 ft. high 6 ft. sqr. chiseled (X) B. R. 1-4-1-363 brs. S. 4° 51' W. 82.0 feet.

A large pine tree on adjacent butte brs. S. 80° 37' W.

No peaks visible.

The S. W. Cor. of Sec. 36, T. 37 N. R. 32 E. W. M. brs. S. 58° 27' 06" E. 6463.65 feet.

U. S. L. M. 362 brs. S. 39° 30' W. 2851.34 feet, Thence N. 81° 23' E. Va. 23° 00.

316.9 Intersect lode lines.

539.79 " line 3-4 Last Chance Lode, this survey.

585.9 To Cor. No. 2, the surface between Cors. No. 1 & 2 rises sharply towards the East.

A pine post 5"x5"-4½ ft. long set 18" in ground to bed rock, with mound of earth & stones scribed 2-363.

A pine tree 14" diam. blazed & scribed B. T. 2-363 brs. S. 63° 42' W. 13.45 ft.

A fir tree 10" diam. blazed and scribed B. T. 2-363 brs. N. 72° 43' E. 17.7 ft.

A prominent peak brs. N. 33° 12' W.

" " " " S. 36° 00' W.

Location Corner is a pine post 5"x5"-5 ft. long planted alongside of stump & is marked S. E. Cor. post, Lone Pine Mineral Claim

& brs. S. $24^{\circ} 10'$ E. 20.6 feet. Thence N. $25^{\circ} 55'$ W. Va. $21^{\circ} 45'$ E.

181.51 Intersect line 3-4 Last Chance lode, this survey.

570. Intersect gully running South Westerly.

1455.7 To corner No. 3.

A pine post $4'' \times 4''$ —6 ft. long set 2 ft. in ground with mound of earth scribed 3-363.

A fir tree $40''$ diam. blazed & scribed B. T. 3-363 brs. S. $75^{\circ} 13'$ W. 107.8 ft.

Another fir tree $12''$ diam. blazed & scribed B. T. 3-363 brs. S. $49^{\circ} 31'$ E. 63 feet.

A butte brs. N. $4^{\circ} 12'$ E.

Location Corner is a pine post $6'' \times 5''$ — $4\frac{1}{2}$ ft. above ground in a clump of small pine trees, is marked N. E. Cor. post Lone Pine Mineral Claim & brs. N. $12^{\circ} 22'$ W. 216 feet. Thence S. $81^{\circ} 23'$ W. Va. $22^{\circ} 00'$ E.

309.1 Intersect lode line & ridge running South Easterly.

626.0 To Corner No. 4 on steep hillside sloping Westerly into Eureka Creek.

A pine post $5'' \times 5''$ — $4\frac{1}{2}$ ft. long, set on bed rock with mound of stone scribed 4-363.

An exposed porphyry rock face (X) cross which brs. it $70^{\circ} 42'$ E. 6.6 ft. & is chiseled B. R. 4-363.

Another rock face (X) cross, on which, brs. S. $9^{\circ} 43'$ E. 17.9 ft. chiseled B. R. 4-363.

A peak brs. N. $32^{\circ} 30'$ W.

“ “ “ S. $12^{\circ} 28'$ E.

Corner No. 1 Pearl Lode this survey brs.
N. $27^{\circ} 24' 39''$ W. 29.02 feet.

Loc. Cor. is a pine post 4 ft. above ground
5"x6" sqr. is mkd. N. W. Cor. post Lone
Pine Mineral Claim & brs. N. $80^{\circ} 00'$ W.
42.2 feet.

—15

B-40

Thence S. $27^{\circ} 24' 39''$ E.

Va. $22^{\circ} 10'$ E.

1330. Intersect gully running South Westerly.

1350. " trail running North Easterly to
Lone Pine tunnel.

1468.12 To cor. No. 1 the place of beginning.

PEARL LODGE.

Beginning at cor. No. 1 on steep hillside.

A pine post 4"x4"—5 ft. long set on bed
rock with mound of stone scribed 1-363.

A cross (X) on rock face brs. S. $0^{\circ} 24'$ W.
5.2 ft. face chiseled B. R. 1-363.

A (X) cross on another rock face bears
N. $14^{\circ} 58'$ E. 17.0 ft. face chiseled B. R.
1-363.

A peak brs. S. $12^{\circ} 08'$ E.

Another peak brs. N. $32^{\circ} 09'$ W.

Location cor. is a pine post 5"x5"—5 ft.
above ground along side projecting ledge of
rock, is marked corner post No. 4 Pearl
Mineral Claim & bears N. $27^{\circ} 24' 39''$ W.
14.6 ft.

Little Cove Loc. Cor. (unsurveyed) lying on hillside brs. S. $5^{\circ} 10'$ W. 55 feet.

The S. W. cor. of Sec. 36 T. 37 N. R. 32 E. W. M. brs. S. $52^{\circ} 45' 36''$ E. 7784.82 feet.

Thence S. $60^{\circ} 19'$ W. Va. $22^{\circ} 10'$ E.

202.8 Intersect lode line.

330.0 " trail running Southeasterly.

420.0 " Eureka Creek.

504.6 To cor. No. 2 at foot of hill.

A pine post $5'' \times 5''$ —6 ft. long set 2.5 ft. in ground with mound of earth, scribed 2-363.

A fir tree 30'' diam. blazed and scribed B. T. 2-363 brs. N. $4^{\circ} 18'$ W. 46.8 feet.

—16

B-41

Another fir tree 30 ins. diam. blazed & scribed B. T. 2-363 brs. S. $38^{\circ} 22'$ E. 23.5 ft.

A point of rocks brs. N. $15^{\circ} 28'$ E.

Location Corner is a fir post $5'' \times 5''$ — $4\frac{1}{2}$ ft. above ground, is marked Post 6 Pearl Mineral Claim & brs. S. $61^{\circ} 50'$ W. 91.5 ft.

Tunnel of Little Cove (unsurveyed) brs. N. $13^{\circ} 12'$ W. 137 ft.

Thence S. $33^{\circ} 26' 27''$ E. Va. $22^{\circ} 00'$ E.

1499.18 To Corner No. 3, which is about 40 ft. above Eureka Creek, on hillside.

A pine post $5'' \times 5''$ —5 ft. long set 2 ft. in ground with mound of earth, scribed 3-363.

A Tamarack tree 30 ins. diam. blazed & scribed B. T. 3-363 brs. S. $30^{\circ} 10'$ W. 21.1 ft.

A fir tree 10 ins. diam. blazed & scribed
B. T. 3-363 brs. N. $12^{\circ} 24'$ W. 36.6 ft.

No peaks visible.

Loc. cor. is a pine stump squared to 6x6"—
5 ft. above ground & marked Cor. post No. 1
Pearl Mineral Claim & brs. S. $60^{\circ} 19'$ W. 35
feet.

Corner No. 2 Surprise lode this survey
brs. S. $60^{\circ} 19'$ W. 20 feet.

Thence N. $60^{\circ} 19'$ E.

Va. $22^{\circ} 00'$ E.

140. Intersect Eureka Creek running South-
erly.

200. Intersect trail.

301.8 " lode line.

347.0 To corner No. 4.

Identical with cor. No. 1 Lone Pine lode
this survey.

Identical with location corner, the same
being; A pine post 5"x4 $\frac{1}{2}$ "—4 $\frac{1}{2}$ ft. above
ground marked corner post No. 3 Pearl
Mineral Claim.

Thence N. $27^{\circ} 24' 39''$ W.

Va. $23^{\circ} 00'$ E.

1497.14 To cor. No. 1 the place of beginning.

—17

B-42

This line from cor. 4 to 1 being coincident
with line 4-1 Lone Pine Lode.

SURPRISE LODGE.

Beginning at cor. No. 1.

Identical with cor. No. 4 Pearl Lode this survey, identical with cor. No. 1 Lone Pine Lode this survey.

Identical with loc. cor. which is a pine post 5x5"-41½' above ground mkd. N. E. cor. post. Surprise Mineral Claim.

The S. W. cor. of Sec. 36 T. 37 N. R. 32 E. W. M. bears S. 58° 27' 06" E. 6463.65 ft.

Thence S. 60° 19' W.

Var. 23° 00' E.

130.0 Intersect Lode line.

347.0 To cor. No. 3 Pearl Lode this survey.

367.0 To cor. No. 2.

A pine post 5x5-5 ft. long set 2 ft. in ground with mound of earth scribed 2-363.

A Tamarack tree 30 ins. diam. blazed & scribed B. T. 2-363 brs. S. 29° 35' E. 9.8 feet.

A Tamarack stump 24 ins. diam. blazed & scribed B. S. 2-363 brs. N. 37° 33' W. 29.4 ft.

No peaks visible.

Loc. cor. is a pine post 5"x5"-41½ ft. above ground, is marked N. W. cor. post Surprise Mineral Claim & bears S. 60° 19' W. 36.5 feet.

Thence S. 12° 11' 39" E.

Va. 21° 45' E.

1520.68 To cor. No. 3 on steep hillside sloping east-
erly into Eureka Creek.

A pine post 4"x4"-6 ft. long set 2.5 ft. in ground with mound of earth, scribed 3-363 whence

A pine tree 20" diam. blazed & scribed
B. T. 3-363 brs. S. $51^{\circ} 30'$ E. 7.8 feet.

—18

B-43

Another fir tree 14 ins. diam. blazed and
scribed B. T. 3-363 brs. N. $40^{\circ} 06'$ W. 27.7 ft.

A prominent peak brs. S. $28^{\circ} 57'$ E.

Location cor. is a fir post 5x6-5 ft. above
ground, is marked S. W. corner post Sur-
prise Mineral Claim & brs. S. $12^{\circ} 11' 39''$ E.
308 ft.

Thence N. $60^{\circ} 19'$ E.

Va. $22^{\circ} 00'$ E.

270.0 Intersect Eureka Creek flowing southerly.

300.0 " trail running "

313.0 " Lode line.

521.0 To cor. No. 4 on hillside about 80 feet
above Eureka Creek.

A pine post 4"x4"-5 ft. long set 2 feet in
ground with mound of earth, scribed 4-363
whence

A fir tree 20" diam. blazed & scribed B. T.
4-363 brs. N. $75^{\circ} 35'$ W. 18.6 feet.

A pine tree 30" diam. blazed & scribed
B. T. 4-363 brs. S. $13^{\circ} 43'$ E. 29.05 ft.

No peaks visible.

Location corner is a pine stump squared
to 5x5-4 $\frac{1}{2}$ ft. above ground, is marked S. E.
cor. post Surprise Mineral Claim & bears
S. $17^{\circ} 53'$ E. 330 ft.

Thence N. $17^{\circ} 53'$ W.

Va. $24^{\circ} 00'$ E.

1481.7 To cor. No. 1 the place of beginning.

LAST CHANCE LODGE.

Beginning at corner No. 1; Identical with loc. cor. which is a pine post 4x5''-4 $\frac{1}{2}$ ft. above ground & is mkd. S. E. cor. post Last Chance Mineral Claim.

A pine 4x4''-5' long set 2' in ground with md. of earth scribed 1-363: A rock in place 2' high by 4' sqr. chiseled (X) B. R. 1-363, cross on which brs. N. 79° 51' E. 73.9 feet.

A prominent peak brs. S. 57° 41' E.

“ “ “ “ S. 37° 19' W.

The S. W. cor. of S. 36 T. 37 N., R. 32 E. brs. 58° 53' 44'' E. 5496.63 feet.

—19

B-44

Thence N. 4° 35' 19'' E.

Va. 23° 10' E.

1379.23 Along level bench to cor. No. 2.

A cottonwood post 4x4'' 5 ft. long set 2 ft. in ground with md. of earth scribed 2-363.

A pine tree 20 ins. diam. blazed & scribed B. T. 2-363 brs. N. 43° E. 9.7 feet.

A pine tree 48 ins. diam. blazed & scribed B. T. 2-363 brs. N. 79° 08' W. 35.5 feet.

A prominent peak brs. N. 34° 51' W.

A tree on adjacent butte bears S. 80° 29' W.

Location cor. is a pine post 6x6''-5 ft. above ground, is mkd. N. E. cor. post Last

Chance Mineral Claim & bears N. $13^{\circ} 41'$ E.
714.0 feet. Along side large pine tree.

Thence N. $62^{\circ} 19'$ W.

Va. $23^{\circ} 00'$ E.

307.0 Intersect lode line.

575.0 " Gully running southerly.

665.0 To cor. No. 3 planted in bottom of gully.

A pine post $4 \times 4''$ —6 ft. long set 2 ft. in
ground with mound of earth scribed 3-363.

A pine tree $14''$ diam. blazed & scribed
B. T. 3-363 brs. N. $61^{\circ} 41'$ E. 46.4 feet.

Another Pine tree $24''$ diam. blazed &
scribed B. T. 3-363 brs. S. $44^{\circ} 28'$ W. 39.8
feet.

A peak brs. N. $34^{\circ} 21'$ W.

Loc. cor. is a pine post $6 \times 6''$ —5 ft. above
ground, is marked N. W. cor. Last Chance
Mineral Claim & brs. S. $66^{\circ} 49'$ W. 91 feet.

Thence S. $11^{\circ} 13'$ E.

Va. $22^{\circ} 45'$ E.

190.0 Intersect Gully running southerly.

907.64 " line 3-2 Lone Pine lode this survey.

1081.13 " " 2-1 " " " " " "

From intersection with gully to intersec-
tion with Lone Pine line 2-1 the ground
rises rapidly & from this last intersection to
cor. No. 4 the ground is about level.

1630.2 To cor. No. 4 planted on brow of hill slop-
ing Southerly & Westerly. Identical with
location corner which is;

A pine post 5x5"—4½ ft. above ground alongside squared stump, which is side line stake of Black Tail Lode & is marked S. W. cor post of Last Chance Mineral Claim.

A pine post 5x5"—5 ft. long set 1 ft. in ground to bed rock with mound of stones scribed 4-363 Whence;

A pine tree 2 feet diam blazed & scribed B. T. 4-363 brs. S. 71° 13' W. 80.57 ft.

Another pine tree 14" diam. blazed & scribed B. T. 4-363 brs. N. 85° 30' E. 60.05 feet.

A prominent peak brs. S. 36° 43' W.

Another " " " S. 57° 41' E.

Cor. No. 1-4-1 this survey brs. N. 54° 27' W. 787.24 feet.

Cor. No. 2 Lone Pine lode this survey brs. N. 6° 24' 11" W. 548.91 ft.

Thence S. 62° 19' E.

Va. 24° 45' E.

72.31 Intersect lode line.

182.31 To cor. No. 1 the place of beginning.

The section corner to which the corners of this survey are tied is apparently the S. W. corner of Sec. 36 T. 37 N. R. 32 E. Willamette Meridian and is described in full as follows:

The corner is a porphyry rock showing 8"x12" above ground with mound of earth on North

Pits about 5 feet from rock on Northeast & West.

Va. 23° 35' E.

A pine tree 16 ins. diam. blazed & scribed S. C. T. 37 N. R. 32 S. 36 S. C. B. T. & brss. N. $64^{\circ} 00'$ E. 80.0 ft.

Another pine tree 18 ins. diam. blazed & scribed S. C. T. 37 N. R. 32 S. 35 & 36 S. C. B. T. and bears S. $8^{\circ} 49'$ W. 61.7 feet.

—21

B-46

Mr. Booth & myself retraced the 9th Standard Westward from this corner for about $1\frac{1}{2}$ miles & found only a post mkd. "C. C. 111 111" 2591.8 feet distant & 64.4 ft. West of this C. C. cor. we found a $\frac{1}{4}$ cor. the bearing trees of which had their scribing too indistinct to determine with certainty the name of the $\frac{1}{4}$ cor.

AREAS.

Lone Pine Lode	19.333	Acres
Pearl Lode	14.623	"
Surprise	14.783	"
Last Chance Lode, total area	12,339	A.
Area in conflict with Lone		
Pine excluded.....	0.092	
	<hr/>	
	12.247	
Net area Last Chance	12.247	"
Total area this survey.....	<hr/>	60.986
		"

LOCATION.

This claim is located in what will be Sections 34-35 when this district is subdivided, in T. 37 N. R., 32 E. W. M., & lies about 2 miles North West of the

confluence of the San Puell river & Granite Creek. Eureka Creek, which flows southerly through this claim, joins Granite Creek about $\frac{3}{4}$ mile south of this claim.

—22

B-47

EXPENDITURE OF FIVE HUNDRED DOLLARS.

I certify that the Value of the Labor & improvements upon this claim placed thereon by the claimants is not less than five hundred dollars & that said improvements consist of;

On Lone Pine Lode,

- No. 1. The Discovery, which bears from cor No. 1, N. $0^{\circ} 51'$ W. 670.8 feet. Val. \$10.00
- No. 2. A tunnel 4.5x6.5 ft. running N. $25^{\circ} 00'$ W. 118 ft. to breast the portal of which bears from cor. No. 1, N. $28^{\circ} 24'$ E. 420 feet. Value \$2,360.00
- No. 3. A blacksmith shop 10x12 bears from cor. No. 1, N. $25^{\circ} 30'$ E. 425 feet. Value \$50.00

On Pearl Lode.

- No. 1. The discovery cut of the Pearl Lode which bears from corner No. 1, S. $24^{\circ} 00'$ E. 1227.2 feet & running N. $62^{\circ} 00'$ E. 5 ft. wide & 10 ft. deep in earth & rock. Value \$100.00
- No. 2. A boarding & bunk cabin 16x50 the S. W. cor. of which brs. from cor. No. 1-4-1, N. $55^{\circ} 52'$ W. 150 feet. Value \$150.00

On Surprise Lode.

No. 1. Discovery cut which bears from cor. No. 1,
S. $5^{\circ} 31'$ E. 766.9 feet. Value \$25.00

On Last Chance Lode.

No. 1. The discovery cut which bears from cor. No.
1, N. $30^{\circ} 50'$ W. 200.2 feet. Value \$12.00

Other Improvements

on Pearl Lode.

A cabin 12x14 the S. E. cor. of which brs.
from cor. No. 1-4-1, N. $72^{\circ} 25'$ W. 225
feet belonging to claimant Nevin.

—23

B-48

The surface embraced by this claim rises rapidly from the gulch through which Eureka Creek flows and terminates in a ridge which cleaves the centre of the Lone Pines.

From this ridge the surface again declines easterly into a gully which skirts the east side line of the Lone Pines and joins Eureka Creek about 150 feet west of cor. 1-4-1. The gulch through which Eureka Creek flows averages about 200 ft. in width & is heavily timbered with pine & fir for its entire length through these lodes. Eureka Creek flows southerly through the Pearl and Surprise, and is about 3 ft. wide by 6" deep. The west half of the Last Chance lode lies on ground sloping westerly at a moderately sharp angle, and the east half lies upon a bench about 300 ft. above Eureka Creek.

The veins of this claim dip about $65^{\circ} 00''$ to the East.

The open cut of the Pearl lode continued on its present course into a tunnel will cut the veins of the Lone Pine & Last Chance at a good depth and at the intersection of this tunnel with the vertical plane

of the Lone Pine tunnel an up-cast can be economically put in. By drifting Northerly on the Pearl vein & southerly on the Surprise from the Pearl tunnel, landing the ores at the mouth of this tunnel where ample surface room and water is found for dumping and milling purposes gives one system of workings and one plant of machinery on the most economic basis for development.

—24

B-49

The fact is emphasized that all the veins of this claim dip easterly or away from the creek so that the present system of workings is one on which the expenditure in the above estimate operates to the common benefit of all the lodes in this claim,

INSTRUMENT.

This survey was made with a Gurley light mountain transit with solar attachment.

The courses were deflected from the true meridian as determined by solar observations.

The distances were measured with a 50 & a 400 ft. steel tape.

ADDENDUM.

The arrangement of the corner numbers of the lodes in this survey is made according to the pencil notations made in the Surveyor General's office on the field notes returned to me for correction.

From the common corner of the Lone Pine, Pearl, & Surprise, viz.: 1-4-1 the U. S. L. M. 362 is visible to which direct bearing & distance was measured.

These two facts are my reasons for arranging the numbers as they now stand.

-25 B-50

DIRECTIONS:—1. Carry out the area in acres to three decimals.
2. In balancing Lat. and Dep. do not obliterate or change the original figures except as follows:
Put the corrected figure or figures above in red ink. Do not change the footing of the original figures, but put below them the corrected footing in red ink.

Tabling and Calculations of Lone Pine Group, Survey No. 363.

(For Surveyor General's Office.)

No.	Course.	Distance.	Log.		Latitudes.		Departures.		Double M. D.	N. Areas.	S. Areas.
			Sin.	Cos.	North.	South.	East.	West.			
Traverse from S. W. cor. Sec. 36 T. 37 N. R. 32 E., W. M. to cor. No.—Last Chance Lode;											
Cor. 36 to point A	N. 61° 35' 18" W.	537726	9.944261	9.677428	3.730561	255852	472958	Resultants:	4706.39	S. 58° 53' 44" E.	
	N. 4° 43' E.	28200	8.915022	9.998527	2.450249	28105	2319	2839.57	2839.57		
	A to cor 1						2319472958	2319	2839.57	=5496.63 feet.	
						283957				Cos. 58° 53' 44"	
Traverse from above Sec. cor. to cor. No. 1 Lone Pine Lode=cor. No. 1 Surprise Lode.											
Last Chance 1 to point B.						283957	470639		5508.34	S. 58° 27' 06" E.	
	N. 62° 19' W.	18231	9.947203	9.667065	2.260810	8470	16144		3381.98		
	Point B, to corner 1-4-1	N. 54° 27' W.	78724	9.910415	9.764485	2.896107	45771	64051	3381.98		
						338198	550834			Cos. 58° 27' 06" =6463.65 feet.	
Traverse from above Sec. cor. to cor. No. 1 Pearl Lode.											
From cor. 1-4-1 to Pearl No. 1						338198	550834		6197.57	S. 52° 45' 36" E.	
	N. 27° 24' 37" W.	149714	9.663104	9.948281	3.175262	132905	68923		4711.03		
							471103	619757		4711.03	=7784.82 feet.
										Cos. 52° 45' 36"	

—27 B-52

DIRECTIONS:—1. Carry out the area in acres to three decimals.
2. In balancing Lat. and Dep. do not obliterate or change the original figures except as follows:
Put the corrected figure or figures above in red ink. Do not change the footing of the original figures, but put below them the corrected footing in red ink.

Tabling and Calculations of Lone Pine Group, Survey No. 363.

(For Surveyor General's Office.)

No.	Course.	Distance.	Log. Sin.	Log. Cos.	Log. Dist.	Latitudes.	Departures.	Double M. D.		N. Areas.	S. Areas.
						North.	South.	East.	West.		
Last Chance Lode.											
1—2	N. 4° 35' 19" E.	137923	8.903094	9.998606	3.139636	137481		11034		151696 54	
2—3	N. 62° 19' W.	66500	9.947203	9.667065	2.822822	30895		58888	—36820		11375539
3—4	S. 11° 13' E.	163020	9.288964	9.991624	3.212241		159906	31710		1023366 42	
4—1	S. 62° 19' E.	18231	9.947203	9.667065	2.260810		8470	16144	—16144	13673 97	
						168376	168376	58888		1.188736 93	
								113755 39			
						2/1.074981 54					
						537490 77=12.339 Acres					
						43560					
Lone Pine & Last Chance Conflict (Area to be excluded from Last Chance).											
Line 1—2											
Lone Pine	N. 81° 23' E.	4611	9.995070	9.175578	1.663795	691		4559		315 03	
Line 2—3											
Lone Pine	N. 25° 55' W.	18151	9.640544	9.953968	2.258900	16326		7933	1185	1934 75	
Line 3—4											
Last Chance	S. 11° 13' E.	17349	9.288964	9.991624	2.239274						
						17018	17018	3374	—3374	5741 87	
						17018	17018	7933	7933	2/7991 65	
						3995.82=0.092 Acres					
						43560					

(4-685)

FINAL OATHS FOR SURVEYS.

List of Names.

A list of the names of the individuals employed by John C. Ralston, United States Deputy Mineral Surveyor, to assist in running, measuring, and marking the lines corners and boundaries described in the foregoing field notes of the survey of the mining claim of James Clark, known as the Surprise, Pearl, Lone Pine & Last Chance and showing the respective capacities in which they acted.

D. BONNER, Chainman.

E. HENDRICK, Chainman.

A. RITCHIE, Axman.

Flagman.

FINAL OATHS OF ASSISTANTS.

We, D. Bonner, E. Hendrick and A. Ritchie, do solemnly swear that we assisted John C. Ralston, United States Deputy Mineral Surveyor, in marking the corners and surveying the boundaries of the mining claim of James Clark, known as the Surprise, Pearl, Lone Pine & Last Chance, represented in the foregoing field notes as having been surveyed by said deputy mineral surveyor and under his direction; and that said survey has been in all respects, to the best of our knowledge and belief, faithfully and correctly executed, and the corner and boundary monu-

ments established according to law and the instruction furnished by the United States Surveyor-General for Washington.

D. BONNER, Chainman.

E. HENDRICK, Chainman.

his

A. X RITCHIE, Axman.

mark.

_____, Flagman.

Subscribed and sworn to by the above-named persons before me this 30th day of June, 1897.

[Seal Notary]

COLIN CAMPBELL,

Notary Public in & for State of Washington, residing at Eureka Camp.

—29

B-54

(4-686.)

FINAL OATH OF U. S. DEPUTY MINERAL SURVEYOR.

I, John P. Ralston, U. S. Deputy Mineral Surveyor, do solemnly swear that, in pursuance of instructions received from the United States Surveyor General for Washington, dated June 17th, 1897, I have, in strict conformity to the laws of the United States, the official regulations and instructions thereunder, and the instructions of said Surveyor General, faithfully and correctly executed the survey of the Mining Claim of James Clark, known as the Surprise, Pearl, Lone Pine & Last Chance Lodes, situate in Eureka Mining District; Stevens

County, Wash., in Section 34-35, Township No. 37 N., Range No. 32 E. unsurveyed, and designated as Survey No. 363, as represented in the foregoing field notes, which accurately show the boundaries of said mining claim as distinctly marked by monuments on the ground, and described in the attached copy of the location certificate, which was received by me from the Surveyor General with said instructions, and that all the corners of said survey have been established and perpetuated in strict accordance with the law, official regulations and instructions thereunder; and I do further solemnly swear that the foregoing are the true and original field notes of said survey and my report therein, and that the labor expended and improvements made upon said mining claim by claimant or his grantors are as therein fully stated, and that the character, extent, location and itemized value thereof are specified therein with particularity and full detail, and that no portion of said labor or improvements so credited to this claim has been included in the estimate of expenditures upon any other claim.

JOHN C. RALSTON,

U. S. Deputy Mineral Surveyor.

Subscribed and sworn to by the said John C. Ralston, U. S. Deputy Mineral Surveyor, before me a Notary Public in & for the State of Washington this 22nd, day of July, 1897.

[Seal Notary]

GEO. T. CLINE,

Notary Public in & for Washington, residing at
Eureka Mining Camp.

LOCATION NOTICE.

“Lone Pine.”

Notice is hereby given that the undersigned, having complied with the requirements of chapter six of title thirty-two of the Revised Statutes of the United States and the local customs, laws and regulations, has located (1500) fifteen hundred linear feet on the Lone Pine Quartz lode situated in Reservation Mining District, Stevens County, Washington and described as follows; is 1500 linear feet in length & 600 linear feet in with; 300 feet on each side of centre line, stakes are placed at each corner and each end of centre line centre line, runs in northwesterly & southeasterly direction; claim is situated about one half mile north of the northwest fork of San Poll Creek & about two & a half miles in a southwesterly direction from O'Brien's ranch.

This notice is placed at discovery post.

Discovered Feby. 28th, 1896.

Located “ “ “

Locators,

PHILIP CREASON.

T. RYAN.

JAMES CLARK.

CHARLES ROBINS.

Witnesses:

G. M. WELTY.

J. WELTY.

Filed for record March 13th, 1896, at 3:20 o'clock
P. M., at the request of Philip Creasor and recorded
& recorded April 4th, 1896.

J. S. McLEAN,
County Auditor.

—31

B-56

State of Washington,
County of Stevens,—ss.

I, John L. Metcalfe, Auditor in & for said County
& State do hereby certify that the within & foregoing
is a full true & correct copy of the record of an in-
strument of writing now recorded in my office on
page 230, volume M, of the Record of Quartz.

In witness whereof I have hereunto set my hand
and affixed my official seal this eighth day of June,
1897.

JOHN L. METCALFE,
Auditor Stevens County, Wash.,
By J. E. Pickerell, Deputy.

—32

B-57

NOTICE OF QUARTZ LOCATION.

“Pearl.”

Washington State,
Eureka Mining District.

Notice is hereby given that the undersigned having
complied with the requirements of chapter six title
thirty-two of the Revised Statutes of the United
States and the laws of the above state and the local
customs and regulations of said District has located

& does hereby locate 1500 linear feet on the Pearl Lode situated in Stevens County in the above state and mining District and further described as follows:

Commencing at a post marked No. 1 at the south corner from thence 300 feet in a northeasterly direction to a center and post marked No. 2. Thence 200 feet in a northeasterly direction to a corner post marked No. 3; Thence 1500 feet in a northwesterly direction to a corner post marked No. 4; Thence 200 feet in a southwesterly direction to a centre and post marked No. 5; Thence 300 feet in a southwesterly direction to a corner post marked No. 6. Thence 1500 feet to place of beginning, intending to claim fifteen hundred feet in length & (500) five hundred feet in width, for the purpose of mining the same, claiming all surface rights, privileges and minerals and other rights granted by existing laws & customs.

This claim is further described as follows: Is situated on the north side of Eureka Creek about 2 miles west of San Poil Creek & lies on the south side of the Lone Pine Mineral Claim and the north side of the Kangaroo & joins Enterprise on southeast end

—33

and the little cove on the northwest end,

Posts are placed at each corner and both ends of centre line. This notice is placed at discovery.

Located this 18th day of July, A. D., 1896.

Locators:

PHILIP CREASOR— $\frac{1}{2}$.

CHARLES P. ROBINS— $\frac{1}{4}$.

JAMES CLARK— $\frac{1}{4}$.

Witness:

J. G. GREEN.

Filed for record Aug. 20th, 1896, & 3 o'clock P. M.,
at the request of J. G. Green & recorded Sept. 5th,
1896.

J. S. McLEAN,
County Auditor.

State of Washington,
County of Stevens,—ss.

I, John L. Metcalfe, Auditor in & for said county
& State do hereby certify that the within & foregoing
is a full, true & correct copy of the record of an in-
strument of writing now recorded in my office on
page 550, volume "Q" of the record of Quartz.

In witness whereof, I have hereunto set my hand
& affixed my official seal this eighth day of June, 1897.

JOHN L. METCALFE,
Auditor Stevens County, Wash.

By J. E. Pickrell,
Deputy.

—34

B-59

LOCATION NOTICE OF QUARTZ LOCATION.

"Surprise."

Washington State,
Reservation Mining District.

Notice is hereby given that the undersigned hav-
ing complied with the requirements of chapter six,
of title thirty-two of the revised statutes of the
United States and the laws of the above state and
the local customs and regulations of said District has

located & does hereby locate 1500 linear feet on the Surprise lode situated in Stevens County in the above state & mining district and further described as follows; 1500 linear feet in length and 600 linear feet in width, 300 linear feet on each side of the centre line discovery post about the centre of claim.

Stakes are placed at each corner and each end of centre line; this notice is placed at discovery and is further described as follows: is situated on the north side of the northwest fork of the San Poill Creek and lies along the south side of the Black Tail Mineral Claim.

Located this 8th day of March, A. D., 1896.

T. RYAN,
CHARLES ROBINS,
Locators.

Witness:

PHILIP CREASOR.

Filed for record March 13th, 1896, at 3:20 o'clock P. M., at the request of Philip Creasor and recorded April 4th, 1896.

J. S. McLEAN,
County Auditor.

State of Washington,
County of Stevens,—ss.

I, John L. Metcalfe, Auditor in and for said county & state, do hereby certify that the within & foregoing is a full, true & correct copy of the record of an instrument of writing now recorded in my office on page 228, volume M, of the record of Quartz.

In witness whereof, I have hereunto set my hand
& affixed my official seal this 8th day of June, 1897.

JOHN L. METCALFE,
Auditor Stevens County, Wash.

By J. E. Pickrell,
Deputy.

—36

B-61

LOCATION NOTICE.

Last Chance:

Notice is hereby given that the undersigned, having complied with the requirements of chapter six of title thirty-two of the Revised Statutes of the United States and the local customs laws & regulations, has located (1500) fifteen hundred linear feet on the Last Chance Quartz Lode situated in Reservation Mining District, Stevens County, Washington and described as follows: is 1500 linear feet in length & 600 linear feet in width. Stakes are placed at each corner & each end of centre line & lies along the north side of the Black Tail Mineral Claim and the Lone Pine Mineral Claim, is situated about one-half mile north of the northwest fork of the San Poll Creek. This claim lies in a northwest & southeasterly direction 300 linear feet on each side of centre line.

Discovered Feby. 29, 1896.

Located “ “ “

Recorded ——— 189—.

T. RYAN,
PHILIP CREASOR,
JAMES CLARK,
CHARLES ROBINS,
Locators.

Attest:

JOHN WELTY.

File for record March 13th, 1896 at 3:20 o'clock
P. M. at the request of Philip Creasor & recorded
April 14th, 1896.

J. S. McLEAN,
County Auditor.

—37

B-62

State of Washington,
County of Stevens,—ss.

I, John L. Metcalfe, Auditor in & for said county
& state, do hereby certify that the within & fore-
going is a full, true, & correct copy of the record
of an instrument of writing now recorded in my
office on page 229, volume "M," of the Record of
Quartz.

In witness whereof, I have hereunto set my hand
& affixed my official seal this 8th day of June, 1897.

JOHN L. METCALFE,
Auditor Stevens County, Wash.

By J. E. Pickrell,
Deputy.

(4-687)

SURVEYOR GENERAL'S CERTIFICATE OF
APPROVAL OF FIELD NOTES AND
SURVEY OF MINING CLAIM.

DEPARTMENT OF THE INTERIOR.

Office of U. S. Surveyor General,
Olympia, Wash.

September 11, 1897.

I, U. S. Surveyor General for Washington, do hereby certify that the foregoing and hereto attached Field Notes and Return of the Survey of the Mining Claim of James Clark, known as the Lone Pine, Pearl, Surprise & Last Chance Lodes, situated in Eureka mining district, Stevens County, Washington, in Sections 34 & 35, Township No. 37 N., Range No. 32 E., W. M. unsurveyed, designated as Survey No. 363, executed by John C. Ralston, U. S. Deputy Mineral Surveyor, June 28th to July 1st, 1897, under my instructions dated June 17th, 1897, have been critically examined and the necessary corrections and explanations made, and the said Field Notes and Return, and the Survey they describe, are hereby approved. A true copy of the copy of the location certificate filed by the applicant for survey is included in the field notes.

WM. P. WATSON,
U. S. Surveyor General for State of Washington.

(4-688.)

U. S. SURVEYOR GENERAL'S FINAL CER-
TIFICATE ON FIELD NOTES.

DEPARTMENT OF THE INTERIOR.

Office of U. S. Surveyor General,
Olympia, Wash.

September 11, 1897.

I, U. S. Surveyor General for Washington, do hereby certify that the foregoing transcript of the Field Notes, return and approval of the Survey of the mining claim of James Clark, known as the Pearl, Lone Pine, Surprise and Last Chance Lodes, situate in Eureka Mining District, Stevens County, Washington, in Sections 34 & 35, Township No. 37 N, Range No. 32 E., W. M., unsurveyed, and designated as Survey No. 363, has been correctly copied from the originals on file in this office; that said Field Notes furnish such an accurate description of said mining claim as will, if incorporated into a patent, serve fully to identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof.

And I further certify that five hundred dollars' worth of labor has been expended or improvements made upon said mining claim by claimant or his grantors, and that said improvements consist of on Lone Pine Lode.

The Discovery \$10.00 A tunnel 4.5x6.5 ft. running 118 ft., val. \$2360.00. A blacksmith shop 10x12, value \$50.00.

On Pearl Lode: The discovery cut 5 ft. wide 10 ft. deep, val. \$100.00. A boarding cabin 16x50, val. \$150.00. On Surprise Lode: Discovery cut value \$25.00; On Last Chance: Discovery cut val. 12.00, other improvements on Pearl Lode: A cabin 12x14 ft., and that no portion of said labor or improvements has been included in the estimate of expenditures upon any other claim.

I further certify that the plat thereof, filed in the U. S. Land Office at Spokane, is correct and in conformity with the foregoing Field Notes.

WM. P. WATSON,
United States Surveyor General for State of Washington.

—40

AFFIDAVIT OF FIVE HUNDRED DOLLARS IMPROVEMENT.

State of Washington,
County of Stevens,—ss.

John Bresnahan & F. A. Williamson, of lawful age, being first duly sworn according to law, depose & say that they are acquainted with the Lone Pine, Last Chance, Surprise & Pearl Mining Claims in Eureka Mining District, county & state aforesaid for which James Clark has made application for patent under the provisions of chapter six, title thirty-two of the Revised Statute of the United States & that the labor done & improvements made

thereon by the applicant & his grantors exceed five hundred dollars in value & said improvements consist of the discovery cut of the Lone Pine Lode \$10.00, Lone Pine tunnel 118 feet in length \$2360.00. A blacksmith shop on the Lone Pine Lode \$50.00 the discovery cut of the Pearl Lode \$100.00. A boarding & bunk cabin on the Pearl Lode \$150.00.

The discovery cut of the Surprise Lode \$25.00 & the discovery cut of the Last Chance Lode \$12.00. Total value \$2707.00.

JOHN BRESNAHAN,
F. A. WILLIAMSON,

Subscribed & sworn to before me this the 28th day of September, A. D., 1897.

[Seal] CHARLES P. ROBBINS,
Notary Public, Residing at Eureka Camp, Stevens
County, State of Washington.

B91

—41

CAPTION.

Abstract of Title to the following described real estate, to wit:

The "Pearl," "Surprise," "Last Chance" and "Lone Pine" Mining Claims Eureka Mining District.

Stevens County, Washington.

No.	Grantor.	Grantee.	Kind of Instrument.	Date of Instrument.		Date of Filing.		Book	Page
				Mo.	Day	Mo.	Day		
1	United States	Creasor—Ryan et al.	Notice.	Feby.	28	Mar.	13	M	230
2	"	Clark-Robins et al.	"	"	29	"	"	M	229
3	"	Ryan and Robins	"	Mar.	5	"	"	M	228
4	"	Creasor, Robins & Clark	"	July	18	Aug.	20	Q	550
5	Philip Creasor	Chas. P. Robbins	Deed	Sept.	25	Oct.	24	D	87
6	Chas. P. Robbins	James Clark	"	"	"	"	"	D	93
7	Philip Creasor	"	"	"	"	"	"	D	97
8	Chas. P. Robbins et al.	"	"	June	9	June	15	N	525
9	"	"	"	July	6	July	19	F	88

<p>Grantor.</p> <p>UNITED STATES</p> <p>to</p> <p>PHILIP CREASOR, T. RYAN, JAMES CLARK & CHARLES ROBINS,</p> <p>Grantees.</p> <p>Consideration: ———</p> <p>Number of Witnesses: 2.</p>	<p>No. 1.</p> <p>Nature of Instrument. Notice of Location.</p> <p>Date of Instrument. Feby. 28, 1896.</p> <p>Date of Acknowledgment.</p> <p>Date of Filing. Mar. 13, 1896.</p> <p>Where Recorded. Book M of Quartz Page 230</p>
--	---

DESCRIPTION OF PROPERTY AND REMARKS.

The "Lone Pine," Eureka Dist., Stevens County,
Wash.

Hereby locate 1500 linear feet by 600 ft. in width on the Lone Pine lode, 300 ft. on each side of center line. Stakes are placed at each corner & each end of center line. Runs in a northwesterly & southeasterly direction, situated about $\frac{1}{2}$ mile north of the northwest fork of San Poill creek & about $2\frac{1}{2}$ miles southwesterly from O'Brien's Ranch.

Located Feby. 28-1896.

PHILIP CREASOR,
T. RYAN,
JAMES CLARK,
CHARLES ROBINS,
Locators.

Witness:

G. M. WELTY.
J. WELTY.

<p>Grantor.</p> <p>UNITED STATES</p> <p>to</p> <p>T. RYAN, PHILIP CREASOR, JAMES CLARK & CHARLES ROBINS,</p> <p>Grantees.</p>	<p>No. 2.</p> <p>Nature of Instrument. Notice of Location.</p> <p>Date of Instrument. Feb'y. 29, 1896.</p> <p>Date of Acknowledgment.</p> <p>Date of Filing. Mar. 13, 1896.</p> <p>Where Recorded.</p>
---	--

Consideration: _____

Number of Witnesses: 1. Book M of Quartz, Page 229

DESCRIPTION OF PROPERTY AND REMARKS.

The "Last Chance," Eureka Dist., Stevens County,
Wash.

Hereby locate 1500 linear ft. in length & 600 ft. in width, stakes are placed at each corner & each end of center line, this lies along the north side of the "Black Tail and Lone Pine claims is situated about one-half mile north of northwest fork of San Poill creek & lies northwesterly & southeasterly.

Located Feb'y. 29-1896.

T. RYAN,
PHILIP CREASOR,
JAMES CLARK,
CHARLES ROBINS,
Locators.

Attest:

JOHN WELTY.

No. 3.

Grantor.
UNITED STATES

Nature of Instrument.
Notice of Location.

to
T. RYAN AND CHARLES ROBINS,
Grantees.

Date of Instrument.
Mar. 5, 1896.
Date of Acknowledgment.

Consideration: ———

Date of Filing.
Mar. 13, 1896.

Number of Witnesses: 1.

Where Recorded.
Book M of Quartz, Page 228

DESCRIPTION OF PROPERTY AND REMARKS.

The "Surprise" Mining Claim, Eureka Dist.,
Stevens Co., Wash.

Hereby locate 1500 ft. in length & 600 ft. in width
on the Surprise Lode 300 ft. on each side center of
lode Discovery post about the center of claim, situ-
ated on north side of the northwest fork of the San
Poill creek & lies along the south side of the Black
Tail mineral claim.

Located Mar. 8-1896.

T. RYAN,
CHARLES ROBINS,
Locators.

Witness:

PHILIP CREASOR.

Grantor. UNITED STATES to PHILIP CREASOR, CHARLES P. ROBBINS and JAMES CLARK, Grantees.	No. 4. Nature of Instrument. Notice of Location. Date of Instrument. July 18, 1896. Date of Acknowledgment. Date of Filing. Aug. 20, 1896. Where Recorded. Book Q of Quartz, Page 550
--	--

Consideration: _____

Number of Witnesses: 1.

DESCRIPTION OF PROPERTY AND REMARKS.

The "Pearl" Mining Claim, Eureka Dist., Stevens
Co., Wash.

Commencing at post marked No. 1 at south corner from thence 300 ft. northeasterly to center end post marked No. 2, thence 200 ft. northeasterly to corner post marked No. 3, thence 1500 ft. northwesterly to corner post marked No. 4, thence 200 ft. southwest-erly to a center end post marked No. 5, thence 300 ft. southwest-erly to corner post marked No. 6, thence 1500 ft. to place of beginning. Is situated on north side of Eureka Creek about 2 miles west of San Poil creek & lies on the south side of the "Lone Pine" & north side of the Kangaroo & joins Enterprise on S. E. & Little Cora on N. W. end.

Located July 18-1896.

PHILIP CREASOR— $\frac{1}{2}$,
CHARLES P. ROBBINS— $\frac{1}{4}$
JAMES CLARK— $\frac{1}{4}$,

Locators.

Witness:

J. G. GREEN.

—46

B-96

No. 5.

Nature of Instrument.
Mining Deed.

Grantor.

PHILIP CREASOR

Date of Instrument.
Sept. 25, 1896.

to

CHARLES P. ROBBINS,

Date of Acknowledgment.
Sept. 25, 1896.

Grantee.

Date of Filing.
Oct. 24, 1896.

Consideration: \$1—

Number of Witnesses: 2.

Where Recorded.
Book D of Deeds, Page 87

Acknowledged before W. C. Morris, Notary Public
Marcus
lie Spokane, Wash.

DESCRIPTION OF PROPERTY AND REMARKS.

An undivided one-twelfth (1-12) interest in the
"Pearl" Mining Claim. Eureka Dist., Stevens
County, Wash. Recorded Book Q, page 550. Records of Quartz of Stevens Co., Wash.

<p>Grantor.</p> <p>CHAS. P. ROBBINS</p> <p>to</p> <p>JAMES CLARK,</p> <p style="text-align: right;">Grantee.</p> <p>Consideration: \$1—</p> <p>Number of Witnesses: 2.</p>	<p>No. 6.</p> <p>Nature of Instrument. Mining Deed.</p> <p>Date of Instrument. Sept. 25, 1896.</p> <p>Date of Acknowledgment. Sept. 25, 1896.</p> <p>Date of Filing. Oct. 24, 1896.</p> <p>Where Recorded. Book D of Deeds, Page 93</p>
--	---

Acknowledged before W. C. Morris, Notary Public, Marcus, Wash.

DESCRIPTION OF PROPERTY AND REMARKS.

An undivided one-fourth ($\frac{1}{4}$) interest in the "Surprise" Mining Claim, Eureka Dist., Stevens County, Wash. Recorded Book M, page 228.

<p>Grantor.</p> <p>PHILIP CREASOR</p> <p>to</p> <p>JAMES CLARK,</p> <p style="text-align: right;">Grantee.</p> <p>Consideration: \$1—</p> <p>Number of Witnesses: 2.</p>	<p>No. 7.</p> <p>Nature of Instrument. Mining Deed.</p> <p>Date of Instrument. Sept. 25, 1896.</p> <p>Date of Acknowledgment. Sept. 25, 1896.</p> <p>Date of Filing. Oct. 24, 1896.</p> <p>Where Recorded. Book D of Deeds, Page 97</p>
--	---

Acknowledged before W. C. Morris, Notary Public, Marcus, Wash.

DESCRIPTION OF PROPERTY AND
REMARKS.

An undivided one-twelfth (1-12) interest in the
"Pearl" Mining Claim, Eureka Dist., Stevens
Co., Wash. Recorded in Book Q of Quartz, page 550

—49

B-99

Grantor.	No. 8.
PHILLIP CREASOR, THOMAS	Nature of Instrument.
RYAN, CHARLES P. ROB-	Mining Deed.
BINS and DENNIS CLARK	Date of Instrument.
	June 9, 1897.
to	Date of Acknowledgment.
JAMES CLARK,	June 9, 1897.
Grantee.	Date of Filing.
	June 15, 1897.
Consideration: \$1—	Where Recorded.
Number of Witnesses: 1.	Book H. of Deeds, Page 525

Acknowledged before W. J. C. Wakefield, Notary Public, Spokane, Wash.

DESCRIPTION OF PROPERTY AND
REMARKS.

All their right, title & interest in the "Surprise"
"Last Chance" and "Lone Pine" Mining Claims
Eureka Mining District, Stevens County, Wash.

Also covers other property; hence Dennis.

Grantor.
 PHILIP CREASOR and CHAS. P.
 ROBBINS

to
 JAMES CLARK,

Grantee.

Consideration: \$5—

Number of Witnesses: 2.

No. 9.
 Nature of Instrument.
 Mining Deed.

Date of Instrument.
 July 6, 1897.

Date of Acknowledgment.
 July 6, 1897.

Date of Filing.
 July 19, 1897.

Where Recorded.
 Book F of Deeds, Page 88

Acknowledged before W. J. C. Wakefield, Notary
 Public, Spokane, Wash.

DESCRIPTION OF PROPERTY AND REMARKS.

All their right, title & interest in and to the "Pearl"
 Mining Claim in Eureka Mining District, Stevens
 County, Wash.

—51
 TAXES.

B-101—102
 No. 10
 REMARKS.

YEAR.

1891
 1892
 1893
 1894
 1895
 1896
 1897
 1898
 1899
 1900

}

I hereby certify that there are no taxes due and unpaid on the lands described in the Caption hereto, and that there are no tax sales of said land unredeemed and that no tax deeds have been given thereon.

Dated, Dec. 1, 1897.

E. D. MINER,
Abstracter.

From the Office of
JNO. L. METCALFE,
Auditor Stevens County,
Colville, - - - - Wash.

—52

State of Washington,
County of Stevens,—ss.

I, Jno. L. Metcalfe, Auditor of said County, do hereby certify that the foregoing is a true, full and correct abstract of the title of the "Pearl," "Surprise," "Last Chance" & "Lone Pine" lodes therein described, as the same appears of record in said office, and shows all location certificates, deeds or other instruments appearing of record, purporting to convey or affect the same.

WITNESS my hand and seal of said office this 1st day of December, A. D., 1897.

JNO. L. METCALFE,
County Auditor.

TAXES.

YEAR.		REMARKS.
1891	}	
1892		
1893		
1894		
1895		
1896		
1897		
1898		
1899		
1900		

I hereby certify that there are no taxes due and unpaid on the lands described in the Caption hereto, and that there are no tax sales of said land unredeemed and that no tax deeds have been given thereon.

Dated, Dec. 1, 1897.

E. D. MINER,
Abstracter.

JUDGMENTS AND OTHER LIENS.

Plaintiff.	Defendant.	Amount and Date.	When Satisfied.
------------	------------	---------------------	--------------------

State of Washington,
County of Stevens,—ss.

I, the undersigned, do hereby certify that the foregoing 10 sheets (exclusive of the Caption) contains a full and correct abstract of all conveyances, Mortgages, Bonds for Deed, Mechanic's Liens or other instruments of writing now on record in the office of the County Auditor in and for said county, which in any way effect the title to the land described in the Caption hereto, and that there are no judgments rendered in any of the Courts of said County which are a lien on said premises except as shown in this abstract.

Witness my hand this 1st day of Dec. 1897.

E. D. MINER,
Abstracter.

—53

Survey #363.

Abstract of Title

—to the Following—

Real Estate:

The "Pearl," "Surprise," "Last Chance" and "Lone Pine" Mining Claims, Eureka Mining District.

U. S. Land Office,
Spokane, Washington.

Filed Dec. 29-97.
Matthew E. Logan,
Register.

Prepared by.
E. D. MINER,
Abstracter of Titles,
Colville,
Stevens County, Washington.

Request of Forster & Wakefield.

Date June 23, 1897.

—54

B-35

Patent to contain reservation according to proviso
to the Act of August 30, 1890.

[4-201.]

N. REGISTER'S FINAL CERTIFICATE OF
ENTRY.

Mineral Entry

No. 23. 9 Colville.

Min. Survey No. 363.

UNITED STATES LAND OFFICE

at Spokane Falls, Wash.

February 8, 1898.

It is hereby certified that in pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two and legislation supplemental thereto, James Clark, whose Post-office address is Spokane, Wash., on this day purchased the Mining Claims known as the "Lone Pine," "Pearl," "Surprise" and "Last Chance" Lodes. Section —, in Township No. —, — of Range No. — meridian, designated as Min. Survey No. 363, said Min.

Survey, No. 363 extending ^{Lot} 1468 ^{Lot} 12/100 feet in length

along said "Lone Pine," 1499 18/100 feet in length
along said "Pearl," 1499 06/100# feet in length
along said "Surprise," and 1467 07/100# feet in
length along said "Last Chance" vein or lode, ex-
pressly excepting and excluding from said purchase
all that portion of the ground embraced in mining
claim—or survey—designated as Min. Survey No.

Lot

365, being acreage in conflict between the "Lone Pine"
and the "Black Tail" Lodes, amounting to 0.217,
acre#, and also all that portion of any vein or lode
the top or apex of which lies inside of said excluded
ground; said Lode Mining claims as entered, em-
bracing 60-769,# acres, and said Mill-Site claim —
acres, in the Eureka Mining District, in the County
of Stevens and state of Washington as shown by the
plat and field-notes of survey thereof, for which the
said party first above named this day made payment
to the Receiver in full, amounting to the sum of three
hundred and five (305.00) dollars.

Now, therefore, be it known that upon the presenta-
tion of this Certificate to the Commissioner of the
General Land Office, together with the plat and field-
notes of survey of said claim and the proofs required
by law, a Patent shall issue thereupon to the said
James Clark if all be found regular.

Act of Feb. 20-1896, (29 Stat., 9).

MATTHEW E. LOGAN,

Register.

#1499.6
#1467.7

#Area 58.345 acres. C. T. Y.
#Also conflict incl. sur. 374.

—55

REGISTER'S FINAL CERTIFICATE OF
ENTRY.

Mineral Entry No. 23.9 Colville.

for the

Mining Claims known as the

"Lone Pine," "Pearl," "Surprise," and "Last
Chance" Lodes

Min. Survey No. 363.

~~Lot~~

2 check marks.

26694.

Feby. 8/98.

—56

B-33

[4-145]

RECEIVER'S RECEIPT.

(Duplicate to be given the Purchaser.)

Duplicate

Mineral Entry No. 23.

Mineral Survey No. 363.

~~Lot~~

UNITED STATES LAND OFFICE

at Spokane Falls, Wash.

February 8, 1898.

Received from James Clark the sum of three hundred and five (305.00) dollars, the same being pay-

ment in full for the area embraced in the Mining Claims known as the "Lone Pine," "Pearl," "Surprise" and "Last Chance" Lodes, —, in Township No. — of Range No. — meridian, designated as Min. Survey No. 363 said Min. Sur. No. 363 extend-

~~Lot~~

~~Lot~~

ing 1468 12/100 feet in length along said "Lone Pine," 1499 18/100 feet in length along said "Pearl," 1499 06/100 feet in length along said "Surprise" and, 1467 07/100 feet in length along said "Last Chance" vein or lode, expressly excepting and excluding from this sale and Entry all that portion of the ground embraced in mining claim — or Survey designated Min. Survey No. 365, being acreage

~~Lot~~

in conflict between the "Lone Pine" and the "Black Tail" Lodes, amounting to 0.217, acres; and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said Lode Mining claims as entered embracing 60-769 acres and said Mill-Site claim — acres, in the Eureka Mining District, in the County of Stevens and state of Washington, as shown by the survey thereof.

\$305.00/100.

L. M. FLOURNOY,
Receiver.

—57

30698

RECEIVER'S RECEIPT

in

9

Mineral Entry No. ~~23~~.

Colville Series

in case of

the Mining Claim known as the
“Lone Pine,” “Pearl,” “Surprise” and “Last
Chance”

Min. Survey

~~Lot~~ No. 363.

6-375

U. S. Land Office.

Spokane Falls, Wash.

Mch. 16-99.

Min. Patent No. 30698—Cert. No. 9, Colville Series,
delivered to Forster & Wakefield for Patentee
this day in this office.

WILLIAM H. LUDDEN,

10298b-5m

Register.

1899 41174 2

RECEIVER'S RECEIPT.

(Duplicate to be given the Purchaser.)

Mineral Entry No. 23. 9 Colville.

Min. Survey No. 363.

~~Lot~~

UNITED STATES LAND OFFICE.

at Spokane Falls, Wash.

February 8, 1898.

Received from James Clark the sum of three hundred and five (305.00) dollars, the same being payment in full for the area embraced in the Mining Claims known as the "Lone Pine," "Pearl," "Surprise" and "Last Chance" Lodes; Min. Survey No.

~~Lot~~

363, said Min. Survey No. 363 extending 1468 12/100

~~Lot~~

feet in length along said "Lone Pine," 1499 18/100 feet in length along said "Pearl," 1499 06/100 feet in length along said "Surprise" and 1467 07/100 feet in length along said "Last Chance" vein or lode, expressly excepting and excluding from this sale and Entry all that portion of the ground embraced in mining claim or Survey designated as Min. Survey, No. 365, being acreage in conflict between the "Lone Pine" and the "Black Tail" Lodes, amounting to 0.217 acres, and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said Lode Mining claims as entered embracing 60-769 acres and said Mill-Sites claim —

614 *Northport Smelting & Refining Co. vs.*

acres, in the Eureka Mining District, in the County of Stevens and state of Washington, as shown by the survey thereof.

\$305.00/100.

Act of Feb. 20-96 (29 Stat., 9).

L. M. FLOURNOY,
Receiver.

—59

RECEIVER'S RECEIPT.

in

Mineral Entry No. ~~23~~ 9 Coville.

in case of

the Mining Claim known as the
“Lone Pine,” “Pearl,” “Surprise” and “Last
Chance” Lodes.

Mineral Survey,

~~Lot~~ No. 363.

10298b-5m

6-375

—60

B-28

C. T. Y.

M. O. H. G. P.

“N.”

J. V. W.

February — , 1899.

Register and Receiver,

Spokane Falls, Washington.

Sirs:

July 11, 1898 you were directed to notify claimant, James Clark, who made mineral entry No. 9 (Coville series) Feb. 8, 1898, for the Last Chance and other lode claims, that he would be allowed 60 days from notice within which to show cause why his said entry should not be canceled as to that portion

thereof in conflict with the Micawber lode survey No. 365 or to appeal, and at the same time to advise him that an amended survey would have to be made conforming to waiver in favor of Black Girl lode and showing the exclusion of said conflict.

It now appears that due notice thereof was served upon said claimant, and though more than 60 days have elapsed no action has been taken except to furnish the amended plat as above set forth, which was forwarded by the Surveyor-General by letter of January 25, 1899.

In view of the foregoing, said mineral entry No. 9 is hereby canceled on the records of this office as to

—61

B-29

2

its conflict with survey No. 365 for the Micawber lode claim, and the entry as amended approved for patenting.

Note the same on your records and advise the party in interest thereof.

Very respectfully,

BRUGER HAMMOND,

Commissioner.

—62

B-30

C. T. Y.

H. G. P.

July 11, 1898.

Register and Receiver,

Spokane Falls, Washington.

Sirs:

Referring to mineral entry No. 9 (Colville series) made February 8, 1898 by James Clark for the Last

Chance, Lone Pine, Pearl and Surprise lode claims, survey No. 363, I find that said entry includes that portion of the Last Chance in conflict with the Macawber lode claim, survey No. 374. Both claims were located on the same day, to wit: February 29, 189—. The latter location was filed for record March 5, 1896. Application for patent filed October 7, 1897, Publication had from October 14 to December 16, 1897, and entry made January 3, 1898.

The Last Chance location was recorded March 13, 1896. Application for patent filed October 27, 1897. Publication had from November 4, 1897, to January 6, 1898, and entry made February—1898. No adverse protest or objection was offered against the Macawber, whereupon entry was allowed for the entire claim as applied for, including the portion in conflict.

It must from the above statement of facts, be held that the Macawber's rights, are paramount, and that the portion in conflict with the Last Chance must be

—2—

N

—63

B-31

excluded from the latter's entry.

You will notify claimant hereof and advise him that he will be allowed sixty days from notice to show cause why his said entry should not be canceled as to the conflict named, or to appeal, that in the case of default the same will be canceled as stated without further notice from this office. At the same time advise him that the surveyor-general has by letter of even date been directed, upon the request of claimant, to have an amended survey made conforming to waiver in favor of the Black Girl lode claims.

Serve notice and make report in accordance with the circular of October 28, 1886, (5 L. D. 20—).

Very Respectfully,

Commissioner.

—64

B-32

C. T. Y.

H. G. P.

July 8, 1898.

U. S. Surveyor General,
Olympia, Washington.

Sir:

Washington,

Referring to Spokane Falls, ~~Montana~~, mineral entry No. 9 (Colville series) made February 8, 1898, by James Clark for the Last Chance and other lode claims, survey No. 363, I inclose herewith a waiver by claimant as to that portion of the Lone Pine lode in conflict with the Black Tail lode claim, You will after due notice to, and on the proper request of claimant, have an amended survey made conforming thereto. By letter of even date the register and receiver were directed to notify claimant of the action of this office in holding his said entry for cancellation to the extent of conflict with the Macawber lode claim. Should no appeal be taken therefrom, the amended survey should also conform thereto.

When completed promptly forward the amended survey to this office.

Very respectfully,

Commissioner.

W. McMICKEN,
Surveyor General.

A. B. COWLES,
Chief Clerk.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
OFFICE OF U. S. SURVEYOR GENERAL,
For the State of Washington.

Olympia, January 25, 1899.

The Commissioner of the General Land Office,
Washington D. C.

Sir:

Referring to your letter "N," dated July 8, 1898, in the matter of mineral entry No. 9 (Colville series) made February 8, 1898 by James Clark, for the Last Chance and other lode claims, survey No. 363, I have the honor to transmit in separate package the field notes and plat of amended mineral survey No. 363, as directed in said letter.

One copy of the plat has also been forwarded to the Register of the U. S. Land Office, Spokane, Washington.

Very respectfully,

W. McMICKEN,
U. S. Surveyor General, Washington.

U. S. GENERAL LAND OFFICE.

Received Jan. 31, 1899.

12712.

U. S. Surveyor General's Office,

State of Washington,

Olympia, Jany. 25, 1899.

Relating to.....

Referring to letter "N," July 8, 1898, transmits plat and field notes of mineral survey No. 363, mineral entry No. 9 (Colville Series).

N. Z Encs.

—67

B-27

W. McMICKEN,
Surveyor General.

A. B. COWLES,
Chief Clerk.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
OFFICE OF U. S. SURVEYOR GENERAL,

For the State of Washington.

Olympia, October 26, 1898.

The Commissioner of the General Land Office,
Washington D. C.

Sir:

Referring to your letter "N," dated October 21, 1898, requesting a report in the matter of Spokane, Washington, M. E. No. 9 (Colville Series), survey No. 363, by James Clark, for the Last Chance and other lode claims, I have the honor to report that, as directed in your letter "N," dated July 8, 1898,

after due notice to, and on the proper request of, claimant, an amended survey was ordered under date of August 25, 1898, by deputy J. C. Ralston, who is now engaged in perfecting his returns of survey. When properly completed the amended survey will be promptly forwarded to your office.

Very respectfully,

W. McMICKEN,
U. S. Surveyor General, Washington.

—68

155-40

U. S. GENERAL LAND OFFICE,

Received Nov. 2, 1898.

113645.

U. S. SURVEYOR GENERAL'S OFFICE,

State of Washington,

Olympia, Oct. 26, 1898.

Relating to M. E. No. 9, Washington. Report as to Last Chance and other lodes, Survey #363, James Clark. When notes are completed and filed, returns will be made to General Land Office. Refers to letter "N," Oct. 21, 1898 (C. T. Y.) & letter "N," July 8, 1898 (C. T. Y.).

Case—No ans. reqd. Case. C. T. Y. An 4/98. N.

—69

B-25

DEPARTMENT OF THE INTERIOR,

UNITED STATES LAND OFFICE,

Spokane Falls, Wash.

July 20, 1898.

I hereby accept service of notice of contents of

Commissioners letter 3932 N. of July 11—1898 in re Mineral entry No. 9 (Colville Series) made Feb. 8, 1898 by James Clark for the Last Chance, Lone Pine, Pearl and Surprise lode claims and of the conflict of the Last Chance with the Micawber lode claim No. 374.

Also of the direction given the Surveyor General, upon request of claimant, to have an amended survey made conforming to waiver in favor of the Black Tail lode claim.

W. J. C. WAKEFIELD,
Attorney for James Clark.

—70

B-24

UNITED STATES LAND OFFICE,
Spokane Falls, Wash.

Oct. 13, 1898.

Book 11-311

Hon. Commissioner,
General Land Office,
Washington, D. C.

Sir: In response to your letter "N" of July 11, 1898, referring to Mineral entry No. 9 (Colville Series) by James Clark for the "Last Chance," "Lone Pine," "Pearl" and "Surprise" lode claims.

We have the honor to report that on July 20, 98, we served notice of the contents of said letter "N" of July 11, 98, upon W. J. C. Wakefield, atty. for James Clark, and *taken* his receipt therefor.

More than 60 days having elapsed since making said service, and no action having been taken, we now

make report and inclose the proof of service, for your consideration.

Very respectfully,

WILLIAM H. LUDDEN,

Register.

—71

120-40

U. S. GENERAL LAND OFFICE,

Received Oct. 19, 1898.

107845

U. S. LAND OFFICE,

Spokane Falls, Wash.

Oct. 13, 1898.

Register transmits Report and inclose proof of service, and report, no action taken. In Mineral Entry No. 9 (Colville series) of James Clark, involving the "Last Chance" and 3 other Claims of Sec. Tp.——, R.—— Reference is had to letter N of July 11, 1898.

C. T. Y.

N. 1-E.

—72

B-23

UNITED STATES LAND OFFICE,

Spokane Falls, Washington.

February 23, 1898.

Book 10-414,

Hon. Commissioner,

General Land Office,

Washington, D. C.

Sir:

On Feb. 8, 1898 final receipt and final certificate

issued to James Clark upon the "Lone Pine," "Pearl" "Surprise" and "Last Chance" mining claims, and under the Circular of July 6, 1897 all the papers in the case are herewith transmitted to your office.

Very respectfully,

MATTHEW E. LOGAN,

Register.

L. M. FLOURNOY,

Receiver.

—73

U. S. GENERAL LAND OFFICE,

Received Mar. 2, 1898.

21649.

U. S. LAND OFFICE,

Spokane Falls, Wash.

Feb. 23, 98.

Register and Receiver transmits Papers, in Final
Mineral Entry No. 23., Mineral Survey No. 363,
in
of
involving the
..... of Sec.....
Tp. R.
Reference is had to letter..... of.....
Dec....., 189

N. O. R. 17-E,

PROOF OF POSTING NOTICE AND DIAGRAM
ON THE CLAIM.

State of Washington,
County of Stevens,—ss.

James Richey

John Bresnahan and ~~P. Kendregen~~ each for himself, and not one for the other, being first duly sworn, according to law, deposes and says, that he is a citizen of the United States, over the age of twenty-one years, and was present on the 23rd day of October, A. D. 1897, when plats representing the claims of James Clark, being a consolidated mining claim, and certified as correct by the United States Surveyor General of Washington, and designated by him as survey number 363, together with notices of the intention of said James Clark to apply for a patent for the claims and premises so platted, were posted in a conspicuous place upon said mining claims, to-wit: One upon the Surprise lode claim, upon a tree adjoining a tunnel on said claim; one upon the Pearl lode claim, upon the discovery post on said claim; one upon the Lone Pine lode claim, upon the portal of tunnel No. 1 on said claim; and one upon the Last Chance claim, upon the discovery post on said claim, and all of them being where the same could be easily seen and examined, a copy of the notices so conspicuously posted upon said claims is herewith attached and made a part of this affidavit.

JOHN BRESNAHAN.

JAMES RICHEY.

Subscribed and sworn to before me this 23rd day of October, A. D. 1897. And I hereby certify that I consider the above deponents credible and reliable witnesses and that the foregoing affidavit and notice

—75

B-19

were read by each of them before their signatures were affixed thereto and the oath made by them.

CHARLES P. ROBBINS,
Notary Public in and for the State of Washington,
Residing at Eureka Camp, Stevens County,
State of Washington.

—76

B-20

NOTICE OF APPLICATION FOR U. S.
PATENT.

Survey No. 363. United States Land Office,
Spokane, Washington, October 23d 1897.

NOTICE IS HEREBY GIVEN, that in pursuance of the Act of Congress, approved May 10, 1872, James Clark, whose postoffice address is Spokane, Spokane County, State of Washington, has made application for a patent for 1499.6 linear feet on the Surprise lode, bearing N. $14^{\circ} 58'$ W., bearing gold, with surface ground 521 feet in width, and for 1499.18 linear feet on the Pearl lode, bearing N. $33^{\circ} 26' 27''$ W., bearing gold, with surface ground 504.6 feet in width, and for 1468.12 linear feet of the Lone Pine lode, bearing N. $27^{\circ} 24' 39''$ W., with surface ground 600 feet in width, bearing gold, and for 1467.7 linear feet on the Last Chance lode, bearing N. $2^{\circ} 30'$ W., bearing gold, with surface ground 600 feet in width,

being a consolidated mining claim, and all being situated in Eureka Mining District, Stevens County, State of Washington, and described by the official plat herewith posted and by the field notes on file in the office of the Register of Spokane Land District, Washington, and which field notes of survey describe the boundaries and extent of said claims on the surface with magnetic variations at $21^{\circ} 45'$ to $24^{\circ} 45'$ E. as follows, to-wit:

SURPRISE LODGE.

Beginning at the N. E. corner No. 1, whence the S. W. corner Section 36, T. 37 N. R. 32 E. Willamette Meridian bears S. $58^{\circ} 27' 06''$ E. 6463.65 feet and running thence S. $60^{\circ} 19'$ W. 367 feet to N. W. corner post No. 2, thence S. $12^{\circ} 11' 39''$ E. 1520.68 feet to S. W. corner post No. 3, thence N. $60^{\circ} 19'$ E. 521 feet to S. E. corner post No. 4, thence N. $17^{\circ} 53'$ W. 1481.7 feet to corner No. 1 and place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County, at Colville, in the State of Washington, in Book M of Quartz Claims at page 228 the presumed general course or direction of the said Surprise vein, lode or mineral deposit being shown on the plat posted herewith as near as can be determined from present developments, this claim being for 1499.6 feet linear thereof together with the surface ground shown upon the official plat posted herewith, the said vein, lode and mining premises hereby sought to be patented being bounded on the East by the Black Tail lode, on the North by the Pearl lode, and on the South by the Quilp lode.

PEARL LODGE.

Beginning at N. E. corner post No. 1, whence the S. W. corner Sec. 36, T. 37 N. R. 32 E. Willamette Meridian bears S. $52^{\circ} 45' 36''$ E. 7784.82 feet and running thence S. $60^{\circ} 19'$ W. 504.6 feet to corner No. 2, the N. W. corner post, thence S. $33^{\circ} 26' 27''$ E. 1499.18 feet to corner No. 3, the S. W. corner post thence N. $60^{\circ} 19'$ E. 347 feet to corner No. 4, the S. E. corner post, thence N. $27^{\circ} 24' 39''$ W. 1497.14 feet to corner No. 1, the place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County, at Colville, in the State of Washington, in Book Q of Quartz Claims at page 550 the presumed general course or direction of said Pearl vein, lode or mineral deposit being shown upon the plat posted herewith as near as can be determined from present developments; this claim being for 1499.18 feet linear thereof, together with the surface ground shown upon the official plat posted herewith, the said vein, lode and mining premises hereby sought to be patented being bounded on the East by the Lone Pine Lode, on the South by the Surprise Lode and on the North by the Little Cove lode.

LONE PINE LODGE.

Beginning at the S. W. corner No. 1, whence the S. W. corner Section 36 T. 37 N. R. 32 E. Willamette Meridian bears S. $58^{\circ} 27' 06''$ E. 6463.65 feet, and running thence N. $81^{\circ} 23'$ E. 585.9 feet to corner No. 2, the S. E. corner, thence N. $25^{\circ} 55'$ W. 1455.7 feet to corner No. 3, the N. E. corner, thence S. 81°

23' W. 626 feet to corner No. 4, the N. W. corner, thence S. $27^{\circ} 24' 39''$ E. 1468.12 feet to corner No. 1, the place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County, at Colville, in the State of Washington, in Book M of Quartz Claims at page 230. The presumed general course or direction of the said Lone Pine Vein, lode or mineral deposits being shown upon the plat posted herewith, as near as can be determined from present developments; this claim being for 1468.12 feet linear thereof, together with the surface ground shown upon the official plat posted herewith, said vein, lode and mining premises hereby sought to be patented being bounded on the east by the Last Chance Lode, and on the south by the Black Tail lode, and on the west by the Pearl lode.

LAST CHANCE LODGE.

Beginning at the S. E. corner No. 1, whence the S. W. corner Section 36, T. 37, N. R. 32 E. Willamette Meridian bears S. $58^{\circ} 53' 44''$ E. 5496.63 feet and running thence N. $4^{\circ} 35' 19''$ E. 1379.23 feet to N. E. corner post N. 2, thence N. $62^{\circ} 19'$ W. 665 feet to N. W. corner post No. 3, thence S. $11^{\circ} 13'$ E. 1630.2 feet to S. W. corner post No. 4, thence S. $62^{\circ} 19'$ E. 182.31 feet to corner No. 1, the place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County at Colville, in the State of Washington, in Book M of Quartz Claims at page 229 the presumed general course or direction of said Last Chance Vein, lode or mineral deposit being shown upon the plat posted herewith as near as can be determined from present developments,

this claim being for 1467.7 feet linear thereof, to-

—78

B-22

gether with the surface ground shown on the official plat posted herewith, the said vein, lode and mining premises hereby sought to be patented being bounded by the Micawber lode on the east, the Black Tail lode on the south and west and the Lone Pine on the west.

AREA.

Total area of Surprise lode,.....	14.783 acres.
Total area of Pearl lode,.....	14.623 “
Total area of Lone Pine lode,.....	19,333 “
Total area of Last Chance Lode,	12.339
Conflict with Lone Pine.....	.092

Net area Last Chance lode....12.247

12,247 “

Total area lodes,.....60.986 acres.

JAMES CLARK,

Witness:

JOHN BRESNAHAN.

JAMES RICHEY.

Dated on the ground this 23d day of October,
A. D. 1897.

—79

Appli.

Mineral ~~Entry~~ #25, Survey #363. Re “Lone Pine” “Last Chance” “Pearl” and “Surprise” Mining Claims, being a consolidated mining clam. Proof of Posting Notice and Diagram on Claims.

U. S. Land Office, Spokane, Washington. Filed Oct. 27, 97. Matthew E. Logan, Register.

—80

B-17

PUBLISHER'S CONTRACT.

I, the undersigned publisher and proprietor of the "Reservation Record," a weekly newspaper published in Nelson, Stevens County, State of Washington, hereby agree to publish a notice, dated U. S. Land Office, Spokane, Washington, October 23d, 1897, required by Act of Congress, approved May 10, 1872, of the intention of James Clark to apply for a patent for his consolidated mining claim on the Last Chance, Lone Pine, Pearl and Surprise lodes, situate in Eureka Mining District, County of Stevens, State aforesaid, and to hold the said James Clark alone responsible for the amount of our bill for publishing the same. And it is hereby expressly stipulated and agreed that no claim shall be made against the Government of the United States, or its officers or agents, for such publication.

WITNESS my hand this 23d day of October A. D. 1897.

RUBE HULL,
Publisher.

—81

Appli.

Min. Ent. #25. Survey #363. Publisher's Contract. In re Last Chance, Lone Pine, Pearl, and Surprise Lodes. U. S. Land Office Spokane, Washington. Filed Oct. 27, 97. Matthew E. Logan, Register.

PROOF THAT PLATS AND NOTICES REMAINED POSTED ON CLAIMS DURING TIME OF PUBLICATION.

State of Washington,
County of Spokane,—ss.

James Clark, being first duly sworn, according to law, deposes and says,—

That he is the claimant of the “Surprise” lode mining claim, “Pearl” lode mining claim, “Lone Pine” lode mining claim, and “Last Chance” lode mining claim, being a consolidated mining claim, official survey No. 363, Eureka Mining District, Stevens County, State of Washington, the official plats of which premises, together with the notices of his intention to apply for a patent therefor, were posted thereon on the 23d day of October A. D. 1897, as fully set forth and described in the affidavit of John Bresnahan and James Richey, dated the 23d day of October A. D. 1897, which affidavit was duly filed in the office of the Register at Spokane Falls, Spokane County, State of Washington, and that the plats and notices so mentioned and described remained continuously and conspicuously posted upon said mining claims from the 23d day of October A. D. 1897, until and including the 6th day of January A. D. 1898, including the sixty three days period during which notice of said application for patent was published in the newspaper.

JAMES CLARK.

Subscribed and sworn to before me this 7th day of February, A. D. 1898, and I hereby certify that the foregoing affidavit was read to the said James Clark

—83

B-16

previous to his name being subscribed thereto.

GEO. M. FORSTER,

Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

My commission expires on the 4 day of Nov. 1899.

—84

Survey No. 363. "Lone Pine" Group. Proof that Plats and Notices Remained Posted on Claims During Time of Publication. U. S. Land Office, Spokane, Washington. Filed Feb. 7, 98. Matthew E. Logan, Register.

—85

B-14

AFFIDAVIT OF FIVE HUNDRED DOLLARS IMPROVEMENT.

State of Washington,
County of Stevens,—ss.

John Bresnahan & F. A. Williamson, of lawful age being first duly sworn according to law depose & say that they are acquainted with the Lone Pine, Last Chance, Surprise, & Pearl Mining Claims in Eureka Mining District, County & State of aforesaid, for which James Clark has made application for patent under the provisions of Chapter Six Title Thirty two of the Revised Statutes of the United States & that the labor done and improvements made thereon by

the applicant & his grantors exceed five hundred dollars in value & said improvements consist of the discovery cut of the Lone Pine Lode, \$10.00. Lone Pine tunnel One hundred & eighteen (118) feet in length \$2360.00. A blacksmith shop on the Lone Pine Lode \$50.00, the discovery cut of the Pearl Lode \$100.00. A Boarding & Bunk Cabin on the Pearl Lode \$150.00. The discovery cut of the Surprise Lode \$25.00 & the discovery cut of the Last Chance Lode \$12.00 total value \$2707.00.

JOHN BRESNAHAN.

F. A. WILLIAMSON.

Subscribed and sworn to before me this 28th day of Sept. 1897.

[Seal]

CHARLES ROBBINS,

Notary Public.

Residing at Eureka Camp, State of Washington.

—85½

No. 25. Affidavit of \$500. Improvements on Lone Pine Group. U. S. Land Office, Spokane, Washington. Filed Oct. 27, 97. Matthew E. Logan, Register.

—86

B-12

PROOF OF SUMS PAID.

State of Washington,
County of Spokane,—ss.

JAMES CLARK, having been first duly sworn, according to law, deposes and says,— That he is a citizen of the United States, over the age of twenty-one years; that he is the applicant for patent to 1499.6 feet upon the “Surprise” lode, 1499.18 feet

upon the "Pearl" lode, 1468.12 feet upon the "Lone Pine" lode, and 1467.7 feet upon the "Last Chance" lode, being a consolidated mining claim, official survey No. 363, in Eureka Mining District, Stevens County, State of Washington, that in the prosecution of such application he has paid the following sums of money, viz.,—

For Office Work in the Surveyor General's Office.	\$120.00
To J. C. Ralston, Deputy Surveyor, for surveying and platting.....	340.00
To Register and Receiver for filing application in Land Office.....	10.00
To Register and Receiver for filing adverse on conflict between "Surprise" lode mining claim and "Black Tail" lode mining claim, official survey #365.....	10.00
To Register and Receiver for filing adverse on conflict between "Pearl" lode mining claim and said "Black Tail" lode mining claim, official survey #365.....	10.00
To Register and Receiver of Land Office for filing adverse on conflict between said "Surprise" lode mining claim and the "Quilp" lode mining claim, official survey No. 375.....	10.00
To "The Reservation Record" for publication of notice of application.....	104.50
To the Receiver of the Local Land Office for Land.	305.00
	<hr/>
	\$909.50

JAMES CLARK,

Subscribed and sworn to before me Geo. M. Forster this 7th day of February, A. D. 1898. And I hereby certify that I consider the above deponent a credible and reliable witness, and that the foregoing affidavit was read by him before his signature was affixed thereto and the oath made by him.

GEO. M. FORSTER,

Notary Public in and for the State of Washington,
residing at Spokane, Wash.

My commission expires on the 4 day of Nov. 1899.

—88

Survey No. 363. "Lone Pine" Group. Proof of sums paid. U. S. Land Office, Spokane, Washington. Filed Feb. 7, 98. Matthew E. Logan, Register.

—89

NOTICE OF APPLICATION FOR UNITED STATES PATENT.

Mineral application No. 25. Survey No. 363.

Posted on claims October 23, 1897. United States Land Office; Spokane Falls, Washington, October 23, 1897.

NOTICE IS HEREBY GIVEN, that in pursuance of the Act of Congress, approved May 10, 1872, James Clark, whose postoffice address is Spokane, Spokane County, State of Washington, has made application for a patent for 1499.6 linear feet on the

Surprise lode, bearing north 14 degrees 53 minutes west, bearing gold, with surface ground 521 feet in width, and for 1499.18 linear feet on the Pearl lode, bearing north 33 degrees 25 minutes 27 seconds west, bearing gold, with surface ground 504.6 feet in width, and for 1468.12 linear feet of the Lone Pine lode, bearing north 27 degrees 24 minutes 30 seconds west, with surface ground 600 feet in width, bearing gold, and for 1467.7 linear feet on the Last Chance lode, bearing north 2 degrees 30 minutes west, bearing gold, with surface ground 600 feet in width being a consolidated mining claim, and all being situate in Eureka Mining District, Stevens County, State of Washington, and described by the official plat herewith posted and by the field notes on file in the office of the Register of Spokane Falls Land District, Washington, and which field notes of survey describe the boundaries and extent of said claims on the surface with magnetic variations at 21 degrees 45 minutes to 21 degrees 45 minutes east, as follows, to wit:

SURPRISE LODE.

Beginning at the northeast corner No. 1, whence the southwest corner section 36, township 37 north, range 32 east, Willamette Meridian bears south 58 degrees 27 minutes 06 seconds east 6463.65 feet running thence south 60 degrees 19 minutes west 367 feet to northwest corner post No. 2, thence south 12 degrees 11 minutes, 39 seconds east, 1320.63, feet to southwest corner post No. 3, thence north 60 degrees 19 minutes east 521 feet to southeast corner post No. 4, thence north 37 degrees 33 minutes west

1481.7 feet to corner No. 1 and place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County, at Colville, in the State of Washington in Book M of Quartz Claims, at page 228, the presumed general course or direction of the said Surprise vein, lode or mineral deposit being shown on the plat posted herewith as near as can be determined from present developments, this claim being for 1499.6 feet linear thereof, together with the surface ground shown upon the official plat posted herewith, the said vein, lode and mining premises hereby sought to be patented being bounded on the east by the Black Tail lode, on the North by the Pearl lode, and on the south by the Quilp lode.

PEARL LODGE.

Beginning at northeast corner post No. 1, whence the southwest corner section 36, township 37 north, range 32 east, Willamette Meridian bears south 52 degrees 45 minutes 36 seconds east 778.82 feet and running thence south 30 degrees 19 minutes west 504.6 feet to corner No. 2, the northwest corner post thence south 33 degrees 26 minutes 27 seconds east 1429.18 feet to corner No. 3, the southwest corner post, thence north 60 degrees 19 minutes east 347 feet to corner No. 4, the southeast corner post, thence north 27 degrees 21 minutes 39 seconds west 1497.14 feet to corner No. 1, the place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County, at Colville, in the State of Washington, in Book Q of Quartz Claims at page 550, the presumed general course or direction of

said Pearl vein, lode or mineral deposit being shown upon the plat herewith as near as can be determined from present developments; this claim being for 1499.18 feet linear thereof, together with the surface ground shown upon the official plat posted herewith, the said vein, lode and mining premises hereby sought to be patented being bounded on the east by the Lone Pine Lode, on the south by the Surprise Lode and on the north by the Little Cove lode.

LONE PINE LODGE.

Beginning at the southwest corner No. 1, whence the southwest corner Section 36, township 37 north, range 32 east, Willamette Meridian bears south 58 degrees 27 minutes 06 seconds east 6463.65 feet, and running thence north 81 degrees 23 minutes east 585.9 feet to corner No. 2, the southeast corner, thence north 25 degrees 55 minutes west 1455.7 feet to corner No. 3, the northeast corner, thence south 81 degrees 23 minutes west 626 feet to corner No. 4, the northwest corner, thence south 27 degrees 24 minutes 30 seconds east 1468.12 feet to corner No. 1, the place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County, at Colville, in the State of Washington, in Book M of Quartz Claims, at page 230. The presumed general course or direction of the said Lone Pine vein, lode or mineral deposit being shown upon the plat posted herewith, as near as can be determined from present developments; this claim being for 1468.12 feet linear thereof, together with the surface ground shown upon the official plat posted herewith, said vein lode and mining premises hereby sought to be patented.

being bounded on the east by the Last Chance lode, on the south by the Black Tail lode, and on the west by the Pearl lode.

LAST CHANCE LODGE.

Beginning at the southeast corner No. 1, whence the southwest corner Section 36, Township 37, North Range 32 East Willamette Meridian bears south 58 degrees 53 minutes 44 seconds east 5496.63 feet and running thence north 4 degrees 35 minutes 19 seconds east 1379.23 feet to northeast corner post No. 2, thence north 62 degrees 19 minutes west 665 feet to northwest corner post No. 3, thence south 11 degrees 13 minutes east 1630.2 feet to southwest corner post No. 4, thence south 62 degrees 19 minutes east 182.31 feet to corner No. 1, the place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County at Colville, in the State of Washington, in Book M of Quartz Claims, at page 229, the presumed general course or direction of said Last Chance vein, lode or mineral deposit being shown upon the plat posted herewith as near as can be determined from present developments, this claim being for 1467.7 feet linear thereof, together with the surface ground shown on the official plat posted herewith, the said vein, lode, and mining premises hereby sought to be patented being bounded by the Micawber lode on the east, the Black Tail lode on the south and west and the Lone Pine lode in the west.

AREA.

Total area of Surprise lode.....	14,783 acres.
Total area of Pearl lode.....	14,623 acres.
Total area of Lone Pine lode.....	19,333 acres.
Total area of Last Chance lode.....	12,339
Conflict with Lone Pine.....	.092

Net area Last Chance.....12,237

12,247

Total area lodes.....60,986 acres.

Any and all persons claiming adversely the surface ground, veins, lodes, premises or any portion thereof so described, surveyed, platted and applied for are hereby notified that unless their adverse claims are duly filed as according to law and the regulations thereunder with the Register and Receiver of the United States Land Office at Spokane Falls, Washington, during the sixty days period of publication hereof, they will be barred by virtue of the provisions of the statute.

MATTHEW E. LOGAN,

Register.

Date of first publication, November 4, 1897.

Date of last publication, January 6, 1898.

REGISTER'S CERTIFICATE OF POSTING
NOTICE FOR SIXTY DAYS.

UNITED STATES LAND OFFICE,

At Spokane Falls, Wash.,

February 7, 1898.

I hereby certify that the official plat of the Surprise, Pearl, Lone Pine & Last Chance lode, designated by the Surveyor General as ~~lot~~ ^{survey} No. 363, was filed in this office on the 27, day of Oct, A. D. 1897, and that a notice, of which the attached notice is a copy, of the intention of James Clark, to apply for a patent for the mining claim or premises embraced by said plat, and described in the field notes of survey thereof filed in said application, was posted conspicuously in this office on the 27 day of Oct, A. D. 1897, and remained so posted until the 7 day of Feb. A. D. 1898, being the full period of sixty consecutive days during the period of publication as required by law; and that said plat remained in this office during that time, subject to examination, and that no adverse claim thereto has been filed.

MATTHEW E. LOGAN,

Register.

—91

No. 25. Register's Certificate of Posting Notice for Sixty days. Application for a Patent to The Surprise, Pearl, Lone Pine & Last Chance, lode Mining Claims.

—92

B-9

NOTICE OF APPLICATION FOR UNITED STATES PATENT.

Mineral application No. 25. Survey No. 363.

Posted on claims October 23, 1897. United States Land Office; Spokane Falls, Washington, October 23, 1897.

NOTICE IS HEREBY GIVEN, that in pursuance of the Act of Congress, approved May 10, 1872, James Clark, whose postoffice address is Spokane, Spokane County, State of Washington, has made application for a patent for 1499.6 linear feet on the Surprise lode; bearing north 14 degrees 58 minutes west, bearing gold, with surface ground 521 feet in width, and for 1499.18 linear feet on the Pearl lode, bearing north 33 degrees 26 minutes 27 seconds west, bearing gold, with surface ground 504.6 feet in width, and for 1468.12 linear feet of the Lone Pine lode, bearing north 27 degrees 21 minutes 39 seconds west, with surface ground 600 feet in width, bearing gold, and or 1467.7 linear feet on the Last Chance lode, bearing north 2 degrees 30 minutes west, bearing gold, with surface ground 600 feet in width, being a consolidated mining claim, and all being situate in Eureka Mining District, Stevens County, State of Washington, and described by the

official plat herewith posted and by the field notes on file in the office of the Register of Spokane Falls Land District, Washington, and which field notes of survey describe the boundaries and extent of said claims on the surface with magnetic variations at 21 degrees 45 minutes to 24 degrees 45 minutes east, as follows, to wit:

SURPRISE LODGE.

Beginning at the northeast corner No. 1, whence the southwest corner section 36, township 37 north, range 32 east, Willamette Meridian bears south 58 degrees 27 minutes 06 seconds east 6463.65 feet and running thence south 60 degrees 19 minutes west 367 feet to northwest corner post No. 2, thence south 12 degrees 11 minutes, 39 seconds east, 1520.68 feet to southwest corner post No. 3, thence north 60 degrees 19 minutes east 521 feet to southeast corner post No. 4, thence north 17 degrees 53 minutes west 1481.7 feet to corner No. 1 and place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County, at Colville, in the State of Washington in Book M of Quartz Claims, at page 223, the presumed general course or direction of the said Surprise vein, lode or mineral deposit being shown on the plat posted herewith as near as can be determined from present developments, this claim being for 1499.6 feet linear thereof, together with the surface ground shown upon the official plat posted herewith, the said vein lode and mining premises hereby sought to be patented being bounded on the east by the Black Tail lode, on the North by the Pearl lode, and on the south of the Quilp lode.

PEARL LODE.

Beginning at northeast corner post No. 1, whence the southwest corner section 36, township 37 north, range 32 east, Willamette Meridian bears south 52 degrees 45 minutes 36 seconds east 7784.82 feet and running thence south 60 degrees 19 minutes west 504.6 feet to corner No. 2, the northwest corner post, thence south 33 degrees 26 minutes 27 seconds east 1499.18 feet to corner No. 3, the southwest corner post, thence north 60 degrees 19 minutes east 347 feet to corner No. 4, the southeast corner post, thence north 27 degrees 24 minutes 39 seconds west 1497.14 feet to corner No. 1, the place of beginning, the said mining [Remainder missing from record].

AFFIDAVIT OF PUBLICATION.

State of Washington,
County of Stevens,—ss.

Rube Hull on oath declares that he is one of the publishers of The RESERVATION RECORD, a newspaper published each and every Thursday in the Town of Nelson, County of Stevens, State of Washington, and that the notice of application for U. S. Patent a printed copy of which is hereto annexed, dated October 23, 1897, relating to application for patent for the Surprise, Pearl, Lone Pine and Last Chance lodes was published in the aforesaid newspaper, in its regular edition (and not in a supplement thereof) once a week for 10 consecutive weeks, beginning in the issue date November 4, 1897 and ending in that dated January 6, 1898, and that the aforesaid newspaper was generally circulated and delivered and

mailed to its subscribers throughout the county and state aforesaid during that period.

RUBE HULL,
Publisher.

Subscribed and sworn to before me this 27th day of January 1898.

H. W. GENIN,
Notary Public in and for the State of Washington,
residing at Nelson.

NOTICE OF APPLICATION FOR UNITED STATES PATENT.

Mineral application No. 25. Survey No. 363.

Posted on claims October 23, 1897. United States Land Office; Spokane Falls, Washington, October 23, 1897.

NOTICE IS HEREBY GIVEN, that in pursuance of the Act of Congress, approved May 10, 1872, James Clark, whose postoffice address is Spokane, Spokane County, State of Washington, has made application for a patent for 1499.6 linear feet on the Surprise lode; bearing north 14 degrees 58 minutes west, bearing gold, with surface ground 521 feet in width, and for 1499.18 linear feet on the Pearl lode, bearing north 33 degrees 26 minutes 27 seconds west, bearing gold, with surface ground 504.6 feet in width, and for 1468.12 linear feet of the Lone Pine lode, bearing north 27 degrees 24 minutes 39 seconds west, with surface ground 600 feet in width, bearing gold, and or 1467.7 linear feet on the Last Chance lode, bearing north 2 degrees 30 minutes west, bearing gold, with surface ground 600 feet in

width, being a consolidated mining claim, and all being situate in Eureka Mining District, Stevens County, State of Washington, and described by the official plat herewith posted and by the field notes on file in the office of the Register of Spokane Falls Land District, Washington, and which field notes of survey describe the boundaries and extent of said claims on the surface with magnetic variations at 21 degrees 45 minutes to 24 degrees 45 minutes east, as follows, to wit.

SURPRISE LODE.

Beginning at the northeast corner No. 1, whence the southwest corner section 36, township 37 north, range 32 east, Willamette Meridian bears south 58 degrees 27 minutes 06 seconds east 6463.65 feet and running thence south 60 degrees 19 minutes west 367 feet to northwest corner post No. 2, thence south 12 degrees 11 minutes, 39 seconds east, 1520.68 feet to southwest corner post No. 3, thence north 60 degrees 19 minutes east 521 feet to southeast corner post No. 4, thence north 17 degrees 53 minutes west 1481.7 feet to corner No. 1 and place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County, at Colville, in the State of Washington in Book M of Quartz Claims, at page 223, the presumed general course or direction of the said Surprise vein, lode or mineral deposit being shown on the plat posted herewith as near as can be determined from present developments, this claim being for 1499.6 feet linear thereof, together with the surface ground shown upon the official plat posted herewith, the said vein, lode mining premises

hereby sought to be patented being bounded on the east by the Black Tail lode, on the North by the Pearl lode, and on the south by the Quilp lode.

PEARL LODGE.

Beginning at northeast corner post No. 1, whence the southwest corner section 36, township 37 north, range 32 east, Willamette Meridian bears south 52 degrees 45 minutes 36 seconds east 7784.82 feet and running thence south 60 degrees 19 minutes west 504.6 feet to corner No. 2, the northwest corner post, thence south 33 degrees 26 minutes 27 seconds east 1499.18 feet to corner No. 3, the southwest corner post, thence north 60 degrees 19 minutes east 347 feet to corner No. 4, the southeast corner post, thence north 27 degrees 24 minutes 39 seconds west 1497.14 feet to corner No. 1, the place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County, at Colville, in the State of Washington, in Book Q of Quartz Claims at page 530, the presumed general course or direction of said Pearl vein, lode or mineral deposits being shown upon the plat posted herewith as near as can be determined from present developments; this claim being for 1499.18 feet linear thereof, together with the surface ground shown upon the official plat posted herewith, the said vein, lode and mining premises hereby sought to be patented being bounded on the east by the Lone Pine Lode, on the south by the Surprise Lode and on the north by the Little Cove lode.

LONE PINE LODGE.

Beginning at the southwest corner No. 1, whence at the southwest corner Section 36, township 37 north, range 32 east, Willamette Meridian bears south 58 degrees 27 minutes 06 seconds east 6463.65 feet, and running thence north 81 degrees 23 minutes east 585.9 feet to corner No. 2, the southeast corner, thence north 25 degrees 55 minutes west 1455.7 feet to corner No. 3, the northeast corner, thence south 81 degrees 23 minutes west 626 feet to corner No. 4, the northwest corner, thence south 27 degrees 21 minutes 39 seconds east 1468.12 feet to corner No. 1, the place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County, at Colville, in the State of Washington, in Book M of Quartz Claims, at page 230. The presumed general course or direction of the said Lone Pine vein, lode or mineral deposit being shown upon the plat posted herewith, as near as can be determined from present developments; this claim being for 1468.12 feet linear thereof, together with the surface ground shown upon the official plat posted herewith, said vein, lode and mining premises hereby sought to be patented being bounded on the east by the Last Chance lode, on the south by the Black Tail lode, and on the west by the Pearl lode.

LAST CHANCE LODGE.

Beginning at the southeast corner No. 1, whence the southwest corner Section 36, Township 37, North range 32 east, Willamette Meridian bears south 58 degrees 53 minutes 44 seconds east 5496.63 feet and

running thence north 4 degrees 35 minutes 19 seconds east 1379.23 feet to northeast corner post No. 2, thence north 62 degrees 19 minutes west 665 feet to northwest corner post No. 3, thence south 11 degrees 13 minutes east 1630.2 feet to southwest corner post No. 4, thence south 62 degrees 19 minutes east 182.31 feet to corner No. 1, the place of beginning, the said mining claim being of record in the office of the Auditor of Stevens County at Colville, in the State of Washington, in Book M of Quartz Claims, at page 229, the presumed general course or direction of said Last Chance vein, lode or mineral deposit being shown upon the plat posted herewith as near as can be determined from present developments, this claim being for 1467.7 feet linear thereof, together with the surface ground shown on the official plat posted herewith, the said vein, lode, and mining premises hereby sought to be patented being bounded by the Micawber lode on the east, the Black Tail lode on the south and west and the Lone Pine lode on the west.

AREA.

Total area of Surprise lode.....	14.783	acres.
Total area of Pearl lode.....	14.623	acres.
Total area of Lone Pine lode.....	19.333	acres.
Total area of Last Chance lode..	12.339	
Conflict with Lone Pine.....	092	
Net area Last Chance.....	12.247	
	12.247	acres.
Total area lodes.....	60.986	acres.

Any and all persons claiming adversely the surface ground, veins, lodes, premises or any portion thereof so described, surveyed, platted and applied for are hereby notified that unless their adverse claims are duly filed as according to law and the regulations thereunder with the Register and Receiver of the United States Land Office at Spokane Falls, Washington, during the sixty days period of publication hereof, they will be barred by virtue of the provisions of the statute.

MATTHEW E. LOGAN,
Register.

Date of first publication, November 4, 1897.

Date of last publication, January 6, 1898.

State of Washington,
County of Stevens,—ss.

Rube Hull on oath declares that he is one of the publishers of The RESERVATION RECORD, a newspaper published each and every Thursday in the Town of Nelson, County of Stevens, State of Washington, and that the notice of application for U. S. Patent a printed copy of which is hereto annexed, dated October 23, 1897, relating to application for patent for the Surprise, Pearl, Lone Pine and Last Chance lodes was published in the aforesaid newspaper, in its regular edition (and not in a supplement thereof) once a week for—10—consecutive weeks, beginning in the issue date November 4, 1897 and ending in that dated January 6, 1898, and that the aforesaid newspaper was generally circulated and delivered and

mailed to its subscribers throughout the county and state aforesaid during that period.

RUBE HULL,
Publisher.

Subscribed and sworn to before me this 27th day of January 1898.

H. W. GENIN,
Notary Public for the State of Washington, Residing
at Nelson.

—93

Survey #363 "Surprise," "Pearl" "Lone Pine"
& Last Chance Lode Mining Claims. Proof of Pub-
lication. U. S. Land Office, Spokane, Washington.
Filed Feb. 7, 98. Matthew E. Logan, Register.

—94

B-8

PROOF OF CITIZENSHIP.

State of California,
City and County of San Francisco,—ss.

JAMES CLARK, being first duly sworn, according to law, deposes and says,— That he is the applicant for patent for the "Surprise" lode mining claim, the "Pearl" lode mining claim, the "Lone Pine" lode mining claim and the "Last Chance" lode mining all, being a consolidated mining claim, and all situate in Eureka Mining District, County of Stevens, State of Washington; that he is a naturalized citizen of the United States; took out his final naturalization papers in the Superior Court in and for the County of Spokane, State of Washington, at Spokane, in

said last named County and State, on the tenth day of October A. D. 1894, and is now a resident of the City and County of Spokane, State of Washington; that he is absent from said State of Washington and temporarily stopping in the State of California for the benefit of his health, where he expects to remain for some time.

JAMES CLARK.

Subscribed and sworn to before me this 6th day of December A. D. 1897.

[Seal]

MARK LANE,
Notary Public in and for the State of California,
Residing at San Francisco.

My commission expires on the 15th day of January A. D. 1899.

—95

Proof of Citizenship of James Clark. "Lone Pine" Group. U. S. Land Office, Spokane, Washington. Filed Dec. 29, 97. Matthew E. Logan, Register.

MINERAL SURVEY NO. 363 Amended.

Lot No. —

Spokane Land District.

FIELD NOTES

Amended

of the \wedge survey of the mining claim of
James Clark

Spokane, Washington,

known as the

Lone Pine, Pearl, Last Chance & Surprise Lodes,
Eureka Mining District, Stevens County, Washing-
ton, Section Unsurveyed, Township 37 N., Range 32
E., W. M.

Surveyed under instructions dated Aug. 25, 1898.

By J. C. RALSTON,

U. S. Deputy Mineral Surveyor.

Claim located. Lone Pine, Feb. 28, 1896; Last
Chance, Feb. 29, 1896; Surprise, Mar. 8, 1896; Pearl,
July 18, 1896.

Amended—do.

Survey commenced Sept. 18, 1898.

Survey completed Sept. 20, 1898.

Address communications to claimants' attorneys
Messrs. Forster & Wakefield, Hypotheek Bank Bldg.,
Spokane, Washington.

Trench.

Burch 296 to 300.

Lake 368—369,

Wiley 485.

—97

B-66

Survey No. 363—Amended.

Lone Pine—Pearl—Surprise—Last Chance Lodes.

LONE PINE LODE.

Beginning at cor. No. 1, planted on narrow bench 60 ft. above Eureka Creek.

Identical with location cor. a fir post 5x5-5 ft. long set 2 ft. in ground to bed rock, with mound of earth and stones scribed 1-4-1-363.

A fir tree 12" diam. bears S. 60° W. 45.3 ft. blazed and scribed B. T. 1-4-1-363.

A granite rock showing 6 ft. square x3 ft. high chiseled (X) B. R. 1-4-1-363, bears S. 4.51 W. 82 ft.

A pine tree on adjacent butte bears S. 80-37 W.

No peaks visible.

S. W. cor. Sec. 36, T. 37 N., R. 32 E., W. M., bears S. 58-27-06 E. 6463.65 ft.

Thence N. 81° 23' E. Var. 23° 00' E.

289.5 Intersect line 3-4 Black Tail Lode, Sur. 365 at S. 86-47 E. 417.27 from cor. No. 3.

316.9 Intersect lode line. Discovery on lode line 702.08 ft. from this point.

539.79 Intersect line 3-4 Last Chance Lode, this sur. at N. 11-13 W. 549.07 ft. from cor. No. 4.

585.9 To cor. No. 2—

Planted on hillside sloping west. Surface between cors. 1 and 2 rises sharply easterly.

A pine post 5x5-4½ ft. long set 18" in ground to bed rock, with mound of earth and stones scribed 2-363.

A pine tree 14" diam. bears S. 63-42 W. 13.45 ft.

A fir tree 10" diam. bears N. 72-43 E. 17.7 ft., both blazed and scribed B. T. 2-363.

A peak bears N. 33-12 W.

" " " S. 36-00 W.

Location cor. bears S. 24-10 E. 20.6 ft.

Thence N. 25-55 W. Var. 21°-45' E.
Descend into gully.

—98

B-67

Lone Pine (Continued).

181.51 Intersect line 3-4 Last Chance Lode this sur. at S. 11-13 E. 907.64 ft. from cor. No. 3.

570. Intersect gully running S. W. Thence ascend.

1455.7 To cor. No. 3:—

A pine post 4x4x6 ft. long set 2 ft. in the ground with mound of earth scribed 3-363.

A fir tree 40" in diam. bears S. 75-13 W. 107.8 ft.

A fir tree 12" in diam. bears S. 49-31 E. 63 ft., both blazed and scribed B. T. 3-363.

A butte bears N. 4-12 E.

Location cor. bears N. 12-22 W. 216 ft.

Thence S. 81° 23' W. Var. 22°-00' E.

Ascend.

309.1 Intersect lode line and ridge running S. E.
Lode line bears S. 27° 24' 39" E. 1468.12 ft.

322.3 Intersect line 4-1 Mammoth Lode, Sur.
420, at N. 46-52 E. 192.0 ft. from cor. No. 1.

543. Intersect line 1-2 Mammoth Lode, Sur.
420 at N. 38-30 W., 125.47 ft. from cor. No.
1 and coincident with line 3-4 Little Cove,
Sur. 420 at N. 38-30 W. 42.52 ft. from cor.
No. 4.

626. To cor. No. 4.—

Planted on steep side hill sloping west
into Eureka Creek.

A pine post 5x5-4½ ft. long set to bed rock
with mound of earth and stones scribed 4-
363.

Face of Rock, cross on which bears N. 70-
42 E. 6.6 ft.

Face of Rock, cross on which bears S. 9-
43 E. 17.9 ft., both chiseled (X) B. R. 4-363.

A peak bears N. 32-30 W.

“ “ “ S. 12-28 E.

Cor. No. 1 Pearl Lode, this sur. bears N.
27-24-39 W. 29.02 ft.

Location cor. bears N. 80-00 W. 42.2 ft.

Thence S. 27-24-39 E. Var. 22°-10' E.

Lone Pine (Continued).

Along hillside sloping westerly into Eureka Creek.

- 42.08 Intersect line 4-1 Little Cove Sur. 420 at S. 79-30 W. 90.67 ft. from cor. No. 4.
- 1330.0 Intersect gully running S. W.
- 1350.0 “ trail “ N. E. to Lone Pine Tunnel.
- 1399.12 Intersect line 3-4 Black Tail Lode, Sur. 365 at S. 86-47 E. 98.77 ft. from cor. No. 3. Ascend sharply.
- 1468.12 To cor. No. 1, place of beginning.

Pearl Lode.

Beginning at cor. No. 1, planted on steep hillside sloping westerly.

A pine post 4x4—5 ft. long set on bed rock with mound of earth and stones scribed 1-363.

A cross (X) on rock face bears S. 0-24 W. 5.2 ft.

A cross (X) on rock face bears N. 14-58 E. 17. ft., both chiseled B. R. 1-363.

A peak bears S. 12-08 E.

“ “ “ N. 32-09 W.

Location cor. bears N. 27-24-39 W. 14.6 ft. S. W. cor. Sec. 36-T. 37 N., R. 32 E. W. M. bears S. 52-45-36 E. 7784.82 ft.

Thence S. 60-19 W. Var. 22°-10' E.

Down steep hillside sloping westerly.

- 202.8 Intersect lode line. Discovery is on lode line 1223.8 ft. from this point.
- 203.54 Intersect line 4-1 Little Cove, Sur. 420 at S. 79-30 W. 303.2 ft. from cor. No. 4.
330. Intersect trail running S. E.
- 390.9 " line 2-3 Kangaroo Lode Sur. 444, at N. 35-28-24 W. 1291 ft. from cor. No. 2.
420. Intersect Eureka Creek 3'x6" running S. E.
- 492.6 To cor. No. 2.—
Planted at foot of hill rising to west.
A pine post 5x5-6 ft. long set *set* 2½ ft. in ground with mound of earth scribed 2-363.

—100

B-69

Pearl Lode (Continued).

- A fir tree 30" diam. bears N. 4-18 W. 46.8 ft.
- A fir tree 30" diam. bears S. 38-22 E. 23.5 ft., both blazed and scribed B. T. 2-363.
- A point of rocks bears N. 15-28 E.
- No peaks visible.
- Location cor. bears S. 61-55 W. 90 ft.
- Thence S. 33-02-51 E. Var. 22°-00' E.
- Along foot of hill rising to the west.
- 1282.58 Intersect line 1-2 Kangaroo Lode, Sur. 444 at S. 61-37 W. 156.96 ft. from cor. No. 2.
- 1498.54 To cor. No. 3.—
Planted on hillside 40 ft. above Eureka Creek.
A pine post 5x5—5 ft. long set 2 ft. in ground with mound of earth scribed 3-363.

A tamarack tree 30" diam. bears S. 30-10 W. 21.1' ft.

A fir tree 10" diam. bears N. 12-24 W. 36.6°, both blazed and scribed B. T. 3-363.

No peaks visible.

Location cor. bears S. 60-19 W. 36.5 ft.

Cor. No. 2 Surprise; this sur. bears S. 60-19 W. 21.7 ft.

Thence N. 60-19 E. Var. 22°-00' E.

Descend.

140. Intersect Eureka Creek, running S. at foot of hill.
200. Intersect trail, running S.
- 242.5 Intersect line 2-3 Black Tail Lode, Sur. 365 at S. 19-13-56 E. 124.57 from cor. No. 3.
300. Intersect lode line, which bears N. 33-26-13 W. 1499.18.
- 345.3 To cor. No. 4.—
Identical with cor. 1 Lone Pine, this sur. previously described.
Identical with location cor.
Thence N. 27-24-39 W. Var. 23°-00' E.
Coincident with line 4-1 Lone Pine Lode.
69. Intersect line 3-4 Black Tail, sur. 365, at S. 86-47 E. 98.77 ft. from cor. No. 3.
- 1426.04 Intersect line 4-1 Little Cove, sur. 420 at S. 79-30 W. 90.67 ft. from cor. No. 4.

Pearl Lode (Continued).

- 1468.12 Intersect cor. No. 4 Lone Pine Lode this sur.

1497.14 To cor. No. 1.—place of beginning.

SURPRISE LODE.

Beginning at cor. No. 1.

Identical with cor. No. 4 Pearl and cor. No. 1 Lone Pine Lode, previously described.

The S. W. cor. Sec. 36 T. 37 N., R. 32 E. W. M. bears S. 58-27-06 E. 6463.65 ft.

Thence S. 60-19 W. Var. 23-00 E.

Coincident with line 3-4 Pearl Lode.

102.8 Intersect line 2-3 Black Tail Lode, sur. 365, at N. 19-13-56 W. 778.59 ft. from cor. No. 2.

130. Intersect lode line. Discovery is on lode line 723.4 ft. from this point.

345.3 Intersect cor. No. 3 Pearl Lode, this sur.

367. To cor. No. 2.

A pine post 5x5-5 ft. long set 2 ft. in ground with mound of earth scribed 2-363.

A tamarack tree 30" diam. bears S. 29-35 E. 9.1 ft.

A tamarack stump 24" diam. bears N. 37-33 W. 29.4 ft., both blazed and scribed B. T. and B. S. resp'y., 2-363.

No peaks visible.

Location cor. bears S. 60-19 W. 36.0 ft.

Thence S. 12-11-39 E. Var. 21-45 E.

Along steep hillside sloping easterly into creek.

1520.68 To cor. No. 3.—

Planted on steep hillside sloping east.

A pine post 4x4-6 ft. long set 2½ ft. in ground with mound of earth scribed 3-363.

A pine tree 20" diam. bears S. 51°-30' E.
7.8 ft.

A fir tree 14" diam. bears N. 40-06 W.
27.7 ft., both blazed and scribed B-T-3-363.

A peak bears S. 28-57 E.

—102

B-71

Surprise Lode (Continued).

Location cor. bears S. 12-11-39 E. 308 ft.

Thence N. 60-19 E. Var. 22-00 E.

270. Intersect Eureka Creek and foot of hill.

300. " trail running south.

313. " Lode line and foot of hill rising
easterly. Lode line bears N. 14-58 W. 1499.6.

363.95 Intersect line 2-3 Quilp Lode, sur. 375 at
S. 27-02 E. 497.8 ft. from cor. No. 3.

521. To cor. No. 4.

Planted on hillside sloping westerly and
about 80 ft. above Eureka Creek.

A pine post 4x4-5 ft. long set 2 ft. in
the ground with mound of earth scribed
4-363.

A fir tree 20" diam. bears N. 75-35 W. 18.6
ft.

A pine tree 30" diam. bears S. 13-43 E.
29.35 ft., both blazed and scribed B. T. 4-363.

No peaks visible.

Location cor. bears S. 17-53 E. 330 ft.

Thence N. 17-53 W. Var. 24-00 E.

Along hillside sloping westerly into
Eureka Creek.

476. Intersect line 3-4 Quilp Lode, sur. 375, at
N. 68-02 E. 233.2 ft. from cor. No. 3.
- 650.54 Intersect line 1-2 Black Tail Lode, sur.
365 at S. 86-47 E. 88.21 ft. from cor. No. 2.
- 1481.7 To cor. No. 1—the place of beginning.

LAST CHANCE LODE.

Beginning at cor. No. 1—

Planted on hillside sloping south.

Identical with location cor.

A pine post 4x4-5 ft. long set 2 ft. in the
ground with mound of earth, scribed 1-363.

A rock showing 2 ft. sq. x 2 ft. above
ground, cross (X) on which bears N. 79-
51 E. 73.9 ft. chiseled B. R. 1-363.

A peak bears S. 57-41 E.

“ “ “ S. 37-19 W.

—103

B-72

Last Chance Lode (Continued).

The S. W. cor. Sec. 36-T. 37 N., R. 32 E.
W. M. bears S. 58-53-44 E. 5496.63 ft.

Thence-N. 4-35-19 E. Var. 23-10 E.

- 2.1 Intersect line 1-2 Micawber Lode, sur.
374 at S. 77-58 E., 02 ft. from cor. No. 2.
Along level bench.

- 1379.23 To cor. No. 2.—

A cottonwood post 4x4-5 ft. long set 2 ft.
in ground with mound of earth scribed
2-363.

A pine tree 20" diam. bears N. 43-00 E.
9.7 ft.

A pine tree 48" diam. bears N. 79-08 W.
35.5 ft., both blazed and scribed B. T. 2-363.

A peak bears N. 34-51 W.

A tree on butte bears S. 80-29 W.

Location cor. bears N. 13-41 E. 714 ft.

Thence N. 62-19 W. Var. 23-00 E.

Descend.

150.31 Intersect line 2-3 Micawber Lode, sur. 374
at N. 0-54 W. 1442.71 ft. from cor. No. 2.

307. Intersect lode line.

575. " gully running southerly.

Ascend gently.

665. To cor. No. 3.

A pine post 4"x4"-6' long set 2 ft. in
ground with mound of earth scribed 3-363.

A pine tree 14" diam. bears N. 61-41 E.
46.4 ft.

A pine tree 24" diam. bears S. 44-28 W.
39.8 ft., both blazed and scribed B. T. 3-363.

A peak bears N. 34-21 W.

Location cor. bears S. 66-49 W. 91 ft.

Thence S. 11-13 E. Var. 22-45 E.

Slightly down hill.

190. Intersect gully running south.

Ascend rapidly.

907.64 Intersect line 3-2 Lone Pine lode this sur.

1081.13 " " 2-1 " " " " "

and top of hill, thence over rolling ground.

1630.2 To cor. No. 4.—

Last Chance Lode (Continued).

Planted on brow of hill sloping S. and W.
Identical with location cor.

A pine post 5x5-5 ft. long, set 1 ft. in ground to bed rock with mound of earth and stones, scribed 4-363.

A pine tree 2 ft. diam. bears S. 71-13 W.
80.51 ft.

A pine tree 14 ft. diam. bears N. 85-30 E. 60.05 ft., both blazed and scribed B. T. 4-363.

A peak bears S. 36-43 W.

“ “ “ S. 57-41 E.

Thence S. 62-19 E. Var. 24-45 E.

Diagonally down hill.

72.31 Intersect lode line which bears N. 2-30 W.
1467.7 ft.

Discovery on lode line 121. ft. from this point.

182.31 To cor. No. 1—place of beginning.

AREAS.

Lone Pine	19.333
" " conflict with Black Tail not claimed	0.217
<hr/>	
Net area Lone Pine.....	19.116
Pearl	14.388
Surprise	14.783
Last Chance	12.339
" " conflict with Lone Pine not claimed.....	0.092
Last Chance conflict with Mi- cawber not claimed.....	2.189
<hr/>	
Total excluded	2.281
<hr/>	
Last Chance, net area	10.058
<hr/>	
Net area this survey	58.345

LOCATION.

This claim is located in T. 37 N., R. 32 E., W. M., in unsurveyed lands and lies about 2 miles N. W. of confluence of San Poil River and Granite Creek. Eureka Creek which flows southerly through this

claim, joins Granite Creek about $\frac{3}{4}$ mile south of this claim.

Expenditure of \$500.

I certify that the value of the labor and improvements on this claim, placed thereon by the claimants is not less than \$500 and consist of:—

Imp.	On Lone Pine.—	
No. 1	Discovery cut bears from cor. No. 1, N. 0–51 W. 670.8 ft.—Value....	\$10.00
“ 2	Tunnel $4\frac{1}{2}' \times 6\frac{1}{2}'$ running N. 25–00 W. 118 ft. to breast the portal of which bears from cor. No. 1 N. 28–24 E. 420 ft.	\$2360.00
“ 3	Blacksmith shop $10' \times 12'$ bears from cor. No. 1, N. 25–30 E., 425 ft..	\$50.00

Pearl Lode.

“ 1	Discovery cut bears from cor. No. 1, S. 24–00 E., 1227.2 and running N. 62–00 E., $5' \times 10'$ deep in earth & rock.	\$100.00
“ 2	A boarding and bunk house $16' \times 50'$ The S. W. of which bears from cor. 1–4–1 N. 55–52 W. 150 ft.....	\$150.00

Surprise Lode.

“ 1	Discovery cut bears from cor. No. 1, S. 5–31 E. 766.9.....	\$25.00
-----	--	---------

Last Chance Lode.

“ 1	Discovery cut bears from cor. No. 1 N. 30–50 W. 200.2 ft.	\$12.00
-----	--	---------

Total.....\$2707.00

Other Improvements.

A cabin 12'x14', the S. W. cor. of which bears from cor. 1-4-1 N. 72-25 W. 225 ft. owned by claimant herein.

The surface embraced by this claim rises rapidly from the gulch through which Eureka Creek flows and terminates in a ridge which cuts the center of the Lone Pine. From this ridge the surface declines

—106

B-75

easterly into a gully which skirts the east side-line of the Lone Pine and joins Eureka Creek about 150 ft. west of cor. 1-4-1 Eureka Creek gulch averages about 200 ft. wide, thickly timbered with fir and pine for its entire length through these lodes. Eureka Creek flows southerly through the Pearl and Surprise and is about 3 ft. wide, 6 ins. deep. The west half of Last Chance Lode lies on ground sloping westerly at a moderately sharp angle and lies upon a bench about 300 ft. above Eureka Creek. The veins of this claim dip about 65° easterly.

The open cut of the Pearl continued on its present course into a tunnel will cut the veins of the Lone Pine and Last Chance at a good depth, and at the intersection of this tunnel with the vertical plane of the Lone Pine tunnel an Up-cast can be economically put in. By drifting north on the Pearl vein and south on the Surprise from the Pearl tunnel, landing all ores at mouth of this tunnel where ample surface space and water is found for dumping and milling purposes, give one system of workings and

one plant of machinery on the most economical lines of development.

The fact is emphasized that all the veins of this claim dip east, or away from the creek, so that the present system of workings is one on which the expenditures in above estimates operate to the common benefit of all the lodes in this claim.

INSTRUMENT.

This survey was made with a Gurley Light Mountain Transit with Solar Attachment. The courses were deflected from a meridian established by solar observations. The distances were measured with 50 and 400 ft. steel tapes.

This Amended Sur. is identical with the original sur.

DIRECTIONS:—1. Carry out the area in acres to three decimals.
2. In balancing Lat. and Dep. do not obliterate or change the original figures except as follows:
Put the corrected figure or figures above in red ink. Do not change the footing of the original figures, but put below them the corrected footing in red ink.

Tabling and Calculations of Lone Pine Group, Survey No. 363.

(For Surveyor General's Office.)

No.	Course.	Distance.	Log. Sin.	Log. Cos.	Log. Dist.	North.	South.	East.	West.	Double M. D. N. Areas. S. Areas.	
Surprise Lode.											
1-2	S. 60-19 W.	367 00				18174			31884	31884	57945.98
2-3	S. 12-11-39 E.	1520 68				148637		32121	31647	470391.51	
3-4	N. 60-19 E.	521 00				25800		45263	45737	118001.46	
4-1	N. 17-53 W.	1481 70				141011			45500	641600.05	
						166811	166811	77384	77384	2)1287939.00	
	Conflict between Lone Pine and Last Chance.									643969.50	14.783 Acres.
1-2	N. 81-23 E.	46 11				691		4559	4559	43560	
2-3	N. 25-55 W.	181.51				16327		7933	1185	315.03	
3-1	S. 11-13 E.	173 49				17018	17018	3374	3374	1934.75	
						17018	17018	7933	7933	5741.87	
	Conflict between Last Chance and Micawber Sur. 374.									2)7991.65	
										3995.82	0.092 Acres.
										43560	
1-2	N. 62-19 W.	150 31				6983			13310	13310	9294.37
2-3	S. 0-54 E.	1442 71				144253		2266	24354	351313.76	
3-4	S. 77-58 E.	.20				.04		.20	22068	8.83	
4-1	N. 4-35-19 E.	1377 13				137274		11024	11024	151330.86	
						144257	144257	13310	13310	351322.59	160625.23
										160625.23	
										2)190697.36	
										95348.68	2.189 Acres.
										43560	

Conflict between Last Chance and Micawber Sur. 374.

DIRECTIONS:—1. Carry out the area in acres to three decimals.
 2. In balancing Lat. and Dep. do not obliterate or change the original figures except as follows:
 Put the corrected figure or figures above in red ink. Do not change the footing of the original figures, but put below them the corrected footing in red ink.

Tabling and Calculations of Lone Pine Group, Survey No. 363.

(For Surveyor General's Office.)

No.	Course.	Distance.	Log. Sin.	Log. Cos.	Log. Dist.	Latitudes.		Departures.		Double M. D.	N. Areas.	S. Areas.
						North.	South.	East.	West.			
Conflict between Lone Pine and Black Tail, Sur. 365.												
1-2	N. 81-23 E.	289 50				4338		28623		28623	12416.66	
2-3	N. 86-47 W.	318 50				4337			31800	25446	4547.20	
3-1	S. 27-24-39 E.	69 00				1787	6125	3177		3177	1945.91	
						<u>6125</u>				2)18909.77		
						6124	6125	31800	31800	<u>9454.89</u>	=0.217 Acres.	
										<u>43560</u>		
Traverse from S. W. Cor. Sec. 36, T. 37 N., R. 32 E. W. M., to Cor. No. 1 Last Chance Lode.												
	N. 61-35-18 W.	5377 26				255852			472958	Course==4706.39==S.	58-53-44 E.	
	N. 4-43 E.	282 00				28105		2319		<u>2839.57</u>		
						<u>283957</u>		2319	472958	Dist.==2839.57==5496.63 ft.		
									2319	Cos. 58° 53' 44"		
									<u>470639</u>			
Traverse from S. W. Cor. Sec. 36, T. 37 N., R. 32 E. W. M. to Cor. No. 1 Lone Pine and Cor. No. 1 Surprise Lodes.												
	Summary of above,					283957			470639	Course==5508.34==S.	58-27-06 E.	
	N. 62-19 W.	182 31				8470		16144		<u>3381.98</u>		
	N. 54-27 W.	787 24				45771		64051		Dist.==3381.98=6463.65 ft.		
						<u>338198</u>			550834	Cos. 58° 27' 06"		
Traverse from S. W. Cor. Sec. 36, T. 37 N., R. 32 E. W. M. to Cor. No. 1 Pearl Lode.												
	Summary of above,					338198			550834	Course==6197.57==S.	52-45-36 E.	
	N. 27-24-39 W.	1497 14				132905		68923		<u>4711.03</u>		
						<u>471103</u>			619757	Dist.==4711.03==7784.82 ft.		
										Cos. 52° 45' 36"		

FINAL OATHS FOR SURVEYS.

LIST OF NAMES.

A list of the names of the individuals employed by J. C. Ralston, United States Deputy Mineral Surveyor, to assist in running, measuring, and marking the lines corners and boundaries described in the foregoing field notes of the survey of the mining claim of James Clark known as the Lone Pine Group and showing the respective capacities in which they acted.

O. B. SMITH, Jr., Chainman.

EUGENE GOMOND, Chainman.

_____, Axman.

_____, Flagman.

FINAL OATHS OF ASSISTANTS.

We, O. B. Smith and Eugene Gomond, do solemnly swear that we assisted J. C. Ralston, United States Deputy Mineral Surveyor, in marking the corners and surveying the boundaries of the mining claim of James Clark, known as the Lone Pine, Pearl, Surprise, and Last Chance Lodes, Amended survey, represented in the foregoing field notes as having been surveyed by said deputy mineral surveyor and under his direction; and that said survey has been in all respects, to the best of our knowledge and belief, faithfully and correctly executed, and the corner and boundary monuments established ac-

according to law and the instructions furnished by the United States Surveyor-General for Washington.

O. B. SMITH, Jr., Chainman.

EUGENE GOMOND, Chainman,

_____, Axman.

_____, Flagman.

Subscribed and sworn to by the above-named persons before me this 20th day of September, 1898.

[Seal]

R. B. CURRY,

Notary Public in and for the State of Washington,
residing at Republic, Wash.

—112

B-86

(4—686.)

FINAL OATH OF U. S. DEPUTY MINERAL SURVEYOR.

I, J. C. Ralston, U. S. Deputy Mineral Surveyor, do solemnly swear that, in pursuance of instructions received from the United States Surveyor General for Washington, dated August 25th, 1898, I have, in strict conformity to the laws of the United States, the official regulations and instructions thereunder, and the instructions of said Surveyor General, faithfully and correctly executed the survey of the Mining Claim of James Clark, known as the Lone Pine, Pearl, Last Chance and Surprise Lodes, situate in Eureka Mining District, Stevens County, Washington, in Section Unsurveyed, Township No. 37 N., Range No. 32 E. W. M., and designated as Survey No. 363 (Amended), as represented in the foregoing

field notes, which accurately show the boundaries of said mining claim as distinctly marked by monuments on the ground, and described in the attached copy of the location certificate, which was received by me from the Surveyor General with said instructions, and that all the corners of said survey have been established and perpetuated in strict accordance with the law, official regulations and instructions thereunder; and I do further solemnly swear that the foregoing are the true and original field notes of said survey and my report therein, and that the labor expended and improvements made upon said mining claim by claimant or his grantors are as therein fully stated, and that the character, extent, location and itemized value thereof are specified therein with particularity and full detail, and that no portion of said labor or improvements so credited to this claim has been included in the estimate of expenditures upon any other claim.

J. C. RALSTON,

U. S. Deputy Mineral Surveyor.

Subscribed and sworn to by the said J. C. Ralston, U. S. Deputy Mineral Surveyor, before me a Notary Public this 24th day of September, 1898.

[Seal]

E. C. MACDONALD,

Notary Public in and for the State of Washington.

Residing at Spokane.

—113

B-81

LOCATION NOTICE.

“Lone Pine.”

Notice is hereby given that the undersigned, having complied with the requirements of Chapter six

of Title thirty-two of the Revised Statutes of the United States and the local customs, laws and regulations, has located 1500 fifteen hundred linear feet on the Lone Pine Quartz lode, situated in Reservation Mining District, Stevens County, Washington and described as follows; is 1500 linear feet in length and 600 linear feet in width, 300 feet on each side of center line. Stakes are placed at each corner and each end of center line. Center line runs in a north westerly and south easterly direction. Claim is situated about one half mile north of the north west fork of San Pull Creek and about two and a half miles in a south westerly direction from O'Briens ranch.

This notice is placed at discovery post.

Locators:—PHILIP CREASON.

T. RYAN.

JAMES CLARK.

CHARLES ROBINS.

Witness:

G. M. WELTY.

J. WELTY.

Discovery February 28, 1896.

Located February 28, 1896.

Filed for record. Mch. 13, 1896 at 3:20 o'clock P. M. at the request of Philip Creason and recorded April 4, 1896.

J. S. McLEAN,
County Auditor.

State of Washington,
County of Stevens,—ss.

I, Jno. L. Metcalfe, Auditor in and for said County and State, do hereby certify that the within and foregoing is a full true and correct copy of the record of an instrument of writing now recorded in my office, on page 230 volume M of the record of Quartz.

—114

B-82

In Witness Whereof, I have hereunto set my hand and affixed my official seal this eight day of June, 1897.

[Seal]

JNO. L. METCALFE,
Auditor, Stevens County, Wash.

By J. E. Pickrell,
Deputy.

—115

B-83

NOTICE OF QUARTZ LOCATION.

Washington State, Eureka Mining District.

“Pearl.”

Notice is hereby given that the undersigned having complied with the requirements of Chapter six of Title thirty-two of the Revised Statutes of the United States and the laws of the above state and the local customs and regulations of said district has located and does hereby locate 1500 linear feet on the Pearl lode, situated in Stevens County in the above state and Mining District and further described as follows: Commencing at a post marked No. 1 at the South corner from thence 300 feet in

a north easterly direction to a center end post marked No. 2, thence 200 feet in a north easterly direction to a corner post marked No. 3, thence 1500 feet in a north westerly direction to a corner post marked No. 4. Thence 200 feet in a south westerly direction to a center end post marked No. 5, thence 300 feet in a south westerly direction to a corner post marked No. 6. Thence 1500 feet to the place of beginning. Intending to claim fifteen hundred feet in length and 500 five hundred feet in width, for the purpose of mining the same, claiming all surface rights, privileges and minerals and other rights, granted by existing laws and customs. This claim is further described as follows: Is situated on the north side of Eureka Creek about 2 miles west of San Poil Creek and lies on the south side of the "Lone Pine" mineral claim and the north side of the "Kangaroo" and joins Enterprise on south east end and the Little Cove on the north west end. Posts are placed at each corner and both ends of center line. This notice is placed at discovery. Lo-

—116

B-84

cated this 18th day of July, A. D. 1896.

Locators: PHILIP CREASOR $\frac{1}{2}$.

CHARLES P. ROBINS $\frac{1}{4}$.

JAMES CLARK $\frac{1}{4}$.

Witnesses: J. G. GREEN.

Filed for record. Aug. 20th, 1896 at 3 o'clock P. M. at the request of J. G. Green and recorded Sept. 5, 1896.

J. S. McLEAN,
County Auditor.

State of Washington,
County of Stevens,—ss.

I, Jno. L. Metcalfe, Auditor in and for said County and State, do hereby certify that the within and foregoing is a full, true and correct copy of the record of an instrument of writing now recorded in my office on page 550, volume Q of the record of Quartz.

In witness whereof, I have hereunto set my hand and affixed my official seal this eight day of June, 1897.

[Seal]

JNO. L. METCALFE,
Auditor, Stevens County, Wash.

By J. E. Pickrell,
Deputy.

—117

B-85

LOCATION—NOTICE OF QUARTZ LOCATION.

“Surprise”

Washington State.

Reservation Mining District.

Notice is hereby given that the undersigned, having complied with the requirements of Chapter six of Title thirty-two of the revised statutes of the United States and the laws of the above state and the local customs and regulations of said district has located and does hereby locate 1500 linear feet in the Surprise lode situated in Stevens County in the above state and mining district and further described as follows: Is 1500 linear feet in length and 600 linear feet in width 300 linear feet on each side of center line discovery post about the center of claim. Stakes

are placed at each corner and each end of center line. This notice is placed at discovery and further described as follows; Is situated on the north side of the northwest fork of the San Poll Creek and lies along the south side of the Black Tail Mineral Claim. Located this 8th day of March A. D. 1896.

Locators:

T. RYAN.
CHARLES ROBINS.

Witness;

PHILIP CREASOR.

Filed for record March 13, 1896 at 3:20 o'clock P. M. at the request of Philip Creasor and recorded April 4, 1896.

J. L. McLEAN,
County Auditor.

State of Washington,
County of Stevens,—ss.

I, Jno. L. Metcalfe, Auditor in and for said County and State, do hereby certify that the within and foregoing is a full, true and correct copy of the record of an instrument of writing now recorded in my office, on page 228, volume M of the record of Quartz.

—118

B-86

In witness Whereof, I have hereunto set my hand and affixed my official seal this eighth day of June 1897.

[Seal]

JNO. L. METCALFE,
Auditor Stevens County, Wash.
By J. E. Pickrell,
Deputy.

LOCATION NOTICE.

Last Chance.

Notice is hereby given that the undersigned, having complied with the requirements of Chapter six of Title thirty-two of the revised statutes of the United States and the local customs laws and regulations has located 1500 fifteen hundred linear feet on the Last Chance Quartz lode, situated in Reservation Mining District, Stevens County, Washington and described as follows: Is 1500 linear feet in length and 600 linear feet in width. Stakes are placed at each corner and each end of center line, and lies along the north side of the Black Tail Mineral Claim and the Lone Pine Mineral Claim, is situated about one half mile north of the northwest fork of the San Poll Creek. This claim lies in a northwest and southeasterly direction 300 linear feet on each side of center line.

Discovered, February 29, 1896, Recorded—189.

Locator:

T. RYAN.

PHILIP CREASOR.

JAMES CLARK.

CHARLES ROBINS.

Attest:

JAMES WELTY,

Filed for record Mch. 13, 1896 at 3:20 o'clock P. M.
at the request of Philip Creasor and recorded April
14, 1896.

J. S. McLEAN,
County Auditor,

State of Washington,
County of Stevens,—ss.

I, Jno. L. Metcalfe, Auditor in and for said County and State, do hereby certify that the within and foregoing is a full, true and correct copy of the record of an instrument of writing now recorded in my office on page 229, volume M of the record of Quartz

—120

B-88

In witness whereof I have hereunto set my hand and affixed my official seal this eight day of June, 1897.

[Seal]

JNO. L. METCALFE,
Auditor Stevens County, Wash.
By J. E. Pickrell, Deputy.

—121

B-89

(4-687)

SURVEYOR GENERAL'S CERTIFICATE OF
APPROVAL OF FIELD NOTES AND SUR-
VEY OF MINING CLAIM.

DEPARTMENT OF THE INTERIOR,

Office of U. S. Surveyor General,
Olympia, State of Washington.

January 21, 1899.

I, U. S. Surveyor General for Washington do hereby certify that the foregoing and hereto attached Field Notes and Return of the Survey of the Mining

Claim of James Clark, known as the Lone Pine, Pearl, Last Chance and Surprise Lodes, situate in Eureka mining district, Stevens County, Washington, in Section Unsurveyed, Township No. 37 N; Range No. 32 E. W. M, designated as Survey No. 363 Amended executed by J. C. Ralston, U. S. Deputy Mineral Surveyor, September 18-20, 1898, under my instructions dated August 25, 1898, have been critically examined and the necessary corrections and explanations made, and the said Field Notes and Return, and the Survey they describe, are hereby approved. A true copy of the copy of the location certificate filed by the applicant for survey is included in the field notes.

W. McMICKEN,
U. S. Surveyor General for Washington.

—122

B-90

(4-688.)

U. S. SURVEYOR GENERAL'S FINAL CERTIFICATE ON FIELD NOTES.

DEPARTMENT OF THE INTERIOR,

Office of U. S. Surveyor General,
Olympia, State of Washington.

January 21, 1899.

I, U. S. Surveyor General for Washington do hereby certify that the foregoing transcript of the Field Notes, return and approval of the Survey of the mining claim of James Clark, known as the Lone Pine, Pearl, Last Chance and Surprise Lodes, situate in Eureka Mining District, Stevens County, Washington, in Section Unsurveyed, Township No. 37 N.

Range No. 32 E. W. M, and designated as Survey No. 363 Amended, has been correctly copied from the originals on file in this office; that said Field Notes furnish such an accurate description of said mining claim as will, if incorporated into a patent, serve fully to identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *Locus* thereof.

And I further certify that five hundred dollars' worth of labor has been expended or improvements made upon said mining claim by claimant or his grantors, and that said improvements consist of— Lone Pine, Imp. No. 1, Discovery cut value \$10. Imp. No. 2, Tunnel $4\frac{1}{2}' \times 6\frac{1}{2}' \times 118'$ value \$2360. Imp. No. 3, Blacksmith shop $10' \times 12'$ value \$50. Pearl, Imp. No. 1 Discovery cut $5' \times 10'$ value \$100. Imp. No. 2, Boarding and bunk house $16' \times 50'$ value \$150. Surprise Imp. No. 1, Discovery cut value \$25. Last Chance Imp. No. 1, Discovery cut value \$12. Total value of improvements \$2707.00 and that no portion of said labor or improvements has been included in the estimate of expenditures upon any other claim.

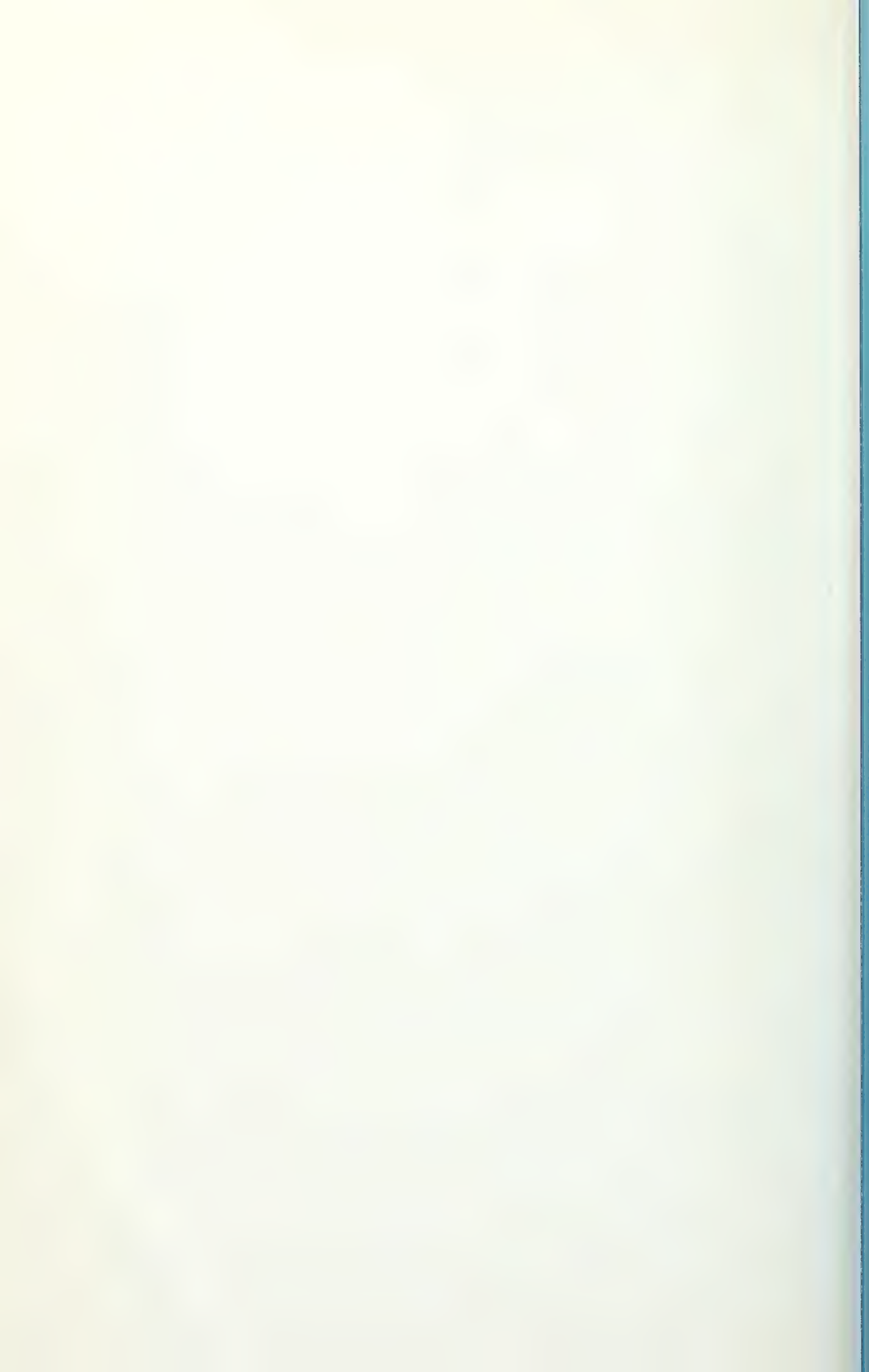
I further certify that the plat thereof, filed in the U. S. Land Office at Spokane is correct and in conformity with the foregoing Field Notes.

W. McMICKEN,

United States Surveyor General for Washington.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Aug 27, 1920. W. H. Hare, Clerk.

No. 3691. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 27, 1921, F, D, Monckton, Clerk,



(4-675)



Lone Pine Lode February 28, 1898
 Claim Located Last Chance " March 29, 1898
 Surprise " July 18, 1898
 Pearl " "

Mineral Survey No. 363 Amended

Lot No. Spokane Land District

PLAT

OF THE CLAIM OF

James Clark
 KNOWN AS THE

Lone Pine, Pearl, Surprise
 and Last Chance Lodes

In the ceded portion of the Colville Ind. Res.
 IN Eureka MINING DISTRICT,

Stevens COUNTY, Washington

Containing an Area of 58.345 (Net) Acres.

Scale of 300 Feet to the inch.

Variation 21°45'24"45"E.

SURVEYED September 16-20 1898 BY

J. C. Ralston

U. S. Mineral Surveyor

The Original Field Notes of the Survey of the Mining Claim of
 James Clark,
 known as the Lone Pine, Pearl, Surprise and
 Last Chance Lodes.

From which this plat has been made, under my direction,
 have been examined and approved, and are on file in this Office,
 and I hereby certify that they furnish such an accurate descrip-
 tion of said Mining Claim as will, if incorporated into a patent,
 serve fully to identify the premises, and that such reference
 is made therein to natural objects or permanent monuments
 as will perpetuate and fix the locus thereof.

I further certify that Five Hundred Dollars worth of labor has
 been expended or improvements made upon said Mining
 Claim by claimant or his grantors, and that
 said improvements consist of: Lone Pine, Imp. No. 1, Discovery
 Cut, value \$10, Imp. 2, Tunnel, value \$250, Imp. 3, Blacksmith Shop 10x12', \$50, Pearl, Imp. 1, Discovery Cut
 \$100, Imp. 2, Boarding House 16'x50'x50', Surprise, Imp. 1,
 Discovery Cut \$25, Last Chance, Imp. 1, Discovery Cut \$12
 Total Value of Improvements \$2707
 that the location of said improvements is correctly shown
 upon this plat, and that no portion of said labor or im-
 provements has been included in the estimate of expendi-
 tures upon any other claim.

And I further certify that this is a correct plat of said Mining
 Claim made in conformity with said original field notes of the
 survey thereof, and the same is hereby approved.

U. S. Surveyor General's Office.

Olympia, Washington

January 21, 1899

W. McMecken

U. S. Surveyor General for

Washington



Plaintiff's Exhibit No. 12.

I hereby certify that this is a true and correct copy of the Plat of Mineral Survey No. 363 Amended, now on file in this office.

U. S. Surveyor General's Office, Olympia, Washington, October 6, 1919.

[Seal]

E. A. FITZHENRY,

U. S. Surveyor General for Washington,

By GEO. F. NADEU,

Ch. Clk.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Aug. 27, 1920. W. H. Hare, Clerk.

No. 3691. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 27, 1921. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 16.

THE C. M. FASSETT CO.

ASSAY OFFICE AND ORE TESTING WORKS.

207-209-211-213 Wall St.

Spokane, Washington, Aug. 23, 1920.

Memorandum of Assay Made for
Northport S. & R. Co.

Sample Mark.	Copper at . cts. per lb. Per Cent.	Lead at . cts. per lb. Per Cent.	Dollars Cts.	Silver at 100 cts. per oz. Ounces.	Assay Value Per Ton of 2,000 Pounds Avoirdupois.			Total. Dollars. Cts.
					Dollars.	10ths.	Ounces.	
2876				None			—07	1 44
2877				—3	—30		—08	1 65
2878				—2	—20		—06	1 24
2879				—3	—30		—41	8 77
2880				—2	—20		—04	1 03
2881				None			—02	—41
2882				—9	—90		—50	11 23
THE C. M. FASSETT CO. K								

{ All samples saved for one year. Pulps can be had }
{ from these samples for check assays, at any time. }

No. 78257-63

Charges, \$———

THE C. M. FASSETT CO.

ASSAY OFFICE AND ORE TESTING WORKS.

207-209-211-213 Wall St.

Memorandum of Assay Made for

Northport S. & R. Co.

Spokane, Washington, Aug. 23, 1920.

Sample Mark.	Copper at . . cts. per lb. Per Cent. Dollars Cts.	Lead at . . cts. per lb. Per Cent. Dollars Cts.	Assay Value Per Ton of 2,000 Pounds Avordupois.			
			Silver at 100 cts. per oz. Ounces. 10ths	Dollars. Cts.	Gold at \$20.67 + per. oz. Ounces. 100ths.	Total. Dollars. Cts.
2883			2	4	2 40	10 74 13 14
2884			1	0	1 00	1 44 2 44
2885			—	2	—20	— 05 1 23
2886			None		— 02	—41 —41
2887			—	2	—20	—41 —61
2888			—	1	—10	— 04 —83
2889			2	3	2 30	— 12 2 48 4 78

No. 78264-70

Charges, \$—

{ All samples saved for one year. Pulps can be had }
{ from these samples for check assays, at any time. }

THE C. M. FASSETT CO.

K

[Endorsed]: Filed in the U. S. District Court,
Eastern District of Washington. Aug. 27, 1920.
W. H. Hare, Clerk.

No. 3691. United States Circuit Court of Appeals
for the Ninth Circuit. Filed May 27, 1921. F. D.
Monckton, Clerk.

ADDRESS ALL COMMUNICATIONS TO THE COMPANY

Northport Smelting & Refining Company

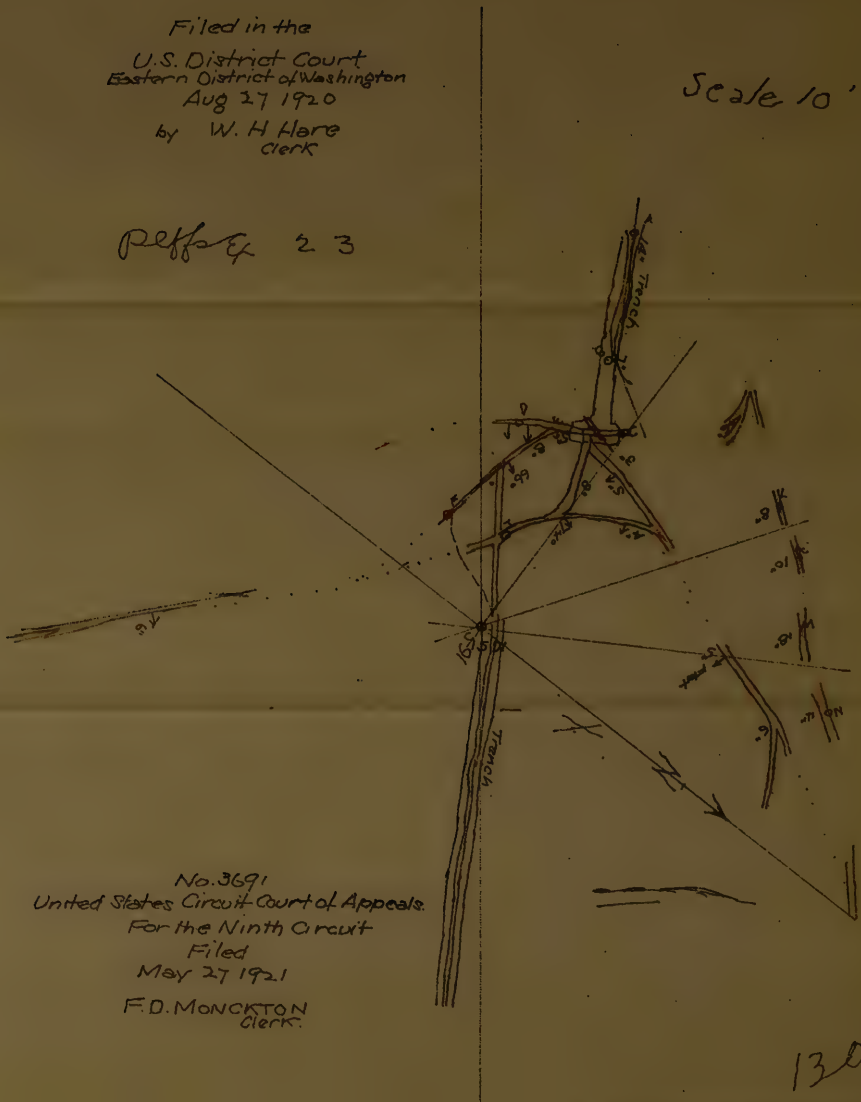
REPUBLIC MINES DEPARTMENT

REPUBLIC, WASH.

Filed in the
U.S. District Court
Eastern District of Washington
Aug 27 1920
by W. H. Hare
clerk

Scale 10'

Peffer 23



No. 3691
United States Circuit Court of Appeals
For the Ninth Circuit
Filed
May 27 1921
F.D. MONCKTON
clerk

130

Plaintiff's Exhibit No. 24.

(No. 12934)

PATENT.

General Land Office,
No. 30698.

Mineral Certificate.
No. 9 (Colville Series).

THE UNITED STATES OF AMERICA,
TO ALL TO WHOM THESE PRESENTS
SHALL COME, GREETING:

WHEREAS, In pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the Plat and Field Notes of survey and the Certificate No. 9 Colville Series, of the Register of the Land Office at Spokane Falls in the State of Washington accompanied by other evidence whereby it appears that James Clark did, on the eighth day of February A. D. 1898, duly enter and pay for that certain mining claim or premises, known as the Lone Pine, Pearl, Surprise and Last Change Lode mining claims, designated by the Surveyor General as Lot No. 363, embracing a portion of the unsurveyed public domain, in the Eureka Mining District, in the County of Stevens and State of Washington in the District of Lands subject to sale at Spokane Falls, and bounded, described, and plat-
ted as follows, with magnetic variations as hereinafter stated.

BEGINNING for the description of the *Lone Pine lode claim* at corner No. 1 a fir post 5 inches square marked 1-4-1-363, with mound of earth and store, from which a fir tree twelve inches in diameter

blazed and marked B. T. 1-4-1-363, bears South sixty degrees west forty-five and three-tenths feet distant; a granite rock six feet square and three feet high chiseled (x) B. R. 1-4-1-363 bears south four degrees and fifty-one minutes west eighty two feet distant; the southwest corner of section thirty-six, township thirty-seven north, of range thirty-two east, Willamette Meridian, bears south fifty-eight degrees, twenty-seven minutes and six second east six thousand four hundred and sixty-three and sixty-five hundredths feet distant discovery cut bears north fifty-one minutes west six hundred and seventy and eight-tenths feet distant, and the portal of a tunnel bears north twenty-eight degrees and twenty-four minutes east four hundred and twenty feet distant.

Thence, first course, magnetic variation twenty-three degrees east, north eighty-one degrees and twenty-three minutes east two hundred and eighty-nine and five-tenths feet intersect line $\frac{3}{4}$ of survey No. 365, the Black Tail lode claim; Five hundred and eighty-five and nine-tenths feet to corner No. 2;

Thence, second course, magnetic variation twenty-one degrees and forty-five minutes east north twenty-five degrees and fifty-five minutes west one thousand four hundred and fifty-five and seven-tenths feet to corner No. 3.

Thence, third course, magnetic variation twenty-two degrees east, south eighty-one degrees and twenty-three minutes west six hundred twenty-six feet to corner No. 4.

Thence, fourth course, magnetic variation twenty-two degrees, and ten minutes east, south twenty-seven

degrees, twenty-four minutes and thirty-nine seconds east one thousand three hundred and ninety-nine and twelve hundredths feet intersect line 3-4 of said survey No. 365, one thousand four hundred and sixty-eight and twelve hundredths feet to corner No. 1, the place of beginning; the survey of the lode as above described extending one thousand four hundred and sixty-eight and twelve hundredths feet in length along said Lone Pine vein or lode.

Beginning for the description of the *Pearl lode claim* at corner No. 1, a pine post four inches square marked 1-363, with mound of earth and stones, from with a cross (X) on rock face chiseled B. R. 1-363 bears south twenty-four minutes west five and two-tenths feet distant; a cross (X) on rock face chiseled B. R. 1-363 bears north fourteen degrees and fifty-eight minutes east seventeen feet distant; said Section corner bears south fifty-two degrees, forty-five minutes and thirty-six seconds east seven thousand seven hundred and eighty-four and eighty-two hundredths feet distant; corner No. 4 of said Lone Pine lode claims bears south twenty-seven degrees, twenty-four minutes and thirty-nine seconds east twenty-nine and two hundredth feet distant, and discovery cut bears south twenty-four degrees east one thousand two hundred and twenty-seven and two-tenths feet distant.

Thence, first course, magnetic variation twenty-two degrees and ten minutes east, south sixty degrees and nineteen minutes west four hundred and ninety-two and six-tenths feet to corner No. 2.

Thence, second course, magnetic variation twenty-

two degrees east south thirty-three degrees, two minutes and fifty-one seconds east one thousand four hundred and ninety-eight and fifty-four hundredths feet to corner No. 3.

Thence, third course, magnetic variation twenty-two degrees east, north sixty degrees and nineteen minutes east two hundred and forty-two and five-tenths feet intersect line 2-3 of said survey No. 365, at south nineteen degrees thirteen minutes and fifty-six seconds east one hundred and twenty-four and fifty-seven hundredths feet from corner No. 3, three hundred and forty-five and three-tenths feet to corner No. 4, identical with corner No. 1 of said Lone Pine lode claim.

Thence, fourth course, magnetic variation twenty-three degrees east, north twenty-seven degrees, twenty-four minutes and thirty-nine second west sixty-nine feet intersect line 3-4 of said survey No. 365 at south eighty-six degrees, and forty-seven minutes east ninety-eight and seventy-seven hundredths feet from corner No. 3, one thousand four hundred and sixty-eight and twelve hundredths feet to corner No. 4, of said Lone Pine lode claim; one thousand four hundred and ninety-seven and fourteen hundredths feet to corner No. 1, the place of beginning; the survey of the lode as above described extending one thousand four hundred and ninety-nine and eighteen hundredths feet in length along said Pearl vein or lode.

Beginning for the description of the *Surprise lode claim* at corner No. 1, identical with corner No. 1 of said Lone Pine and corner No. 4 of said Pearl lode

claims, from which discovery cut bears south five degrees and thirty-one minutes east seven hundred and sixty-six and nine-tenths feet distant.

Thence, first course, magnetic variation twenty-three degrees east, south sixty degrees and nineteen minutes west one hundred and two and eight-tenths feet intersect line 2-3 of said survey No. 365, at north nineteen degrees, thirteen minutes and fifty-six seconds west seven hundred and seventy-eight and fifty-nine hundredths feet from corner No. 2, three hundred and forty-five and three-tenths feet to corner No. 3 of said Pearl lode claim; three hundred and sixty-seven feet to corner No. 2.

Thence, second course, magnetic variation twenty-one degrees and forty-five minutes east, south twelve degrees, eleven minutes and thirty-nine seconds east one thousand five hundred and twenty and sixty-eight hundredths feet to corner No. 3.

Thence, third course, magnetic variation twenty-two degrees east, north sixty degrees and nineteen minutes east five hundred and twenty-one feet to corner No. 4.

Thence, fourth course, magnetic variation twenty-four degrees east, north seventeen degrees and fifty-three minutes west six hundred and fifty and fifty-four hundredths feet intersect line 1-2 of said survey No. 365, at south eighty-six degrees and forty-seven minutes east eighty-eight and twenty-one hundredths feet from corner No. 2, one thousand four hundred and eighty-one and seven-tenths feet to corner No. 1, the place of beginning; the survey of the lode as

above described extending one thousand four hundred and ninety-nine and six-tenths feet in length along said Surprise vein or lode.

Beginning for the description of the *Last Chance lode claim* at corner No. 1, a pine post four inches square marked 1-363, with mound of earth, from which a cross (X) chiseled on a rock two feet square, two feet above ground also chiseled B. R. 1-363 bears north seventy-nine degrees and fifty-one minutes east seventy-three and nine-tenths feet distant, said section corner bears south fifty-eight degrees, fifty-three minutes and forty-four seconds east five thousand four hundred and ninety-six and sixty-three hundredths feet distant, and discovery cut bears north thirty degrees and fifty minutes west two hundred and two-tenths feet distant.

Thence, first course, magnetic variation twenty-three degrees and ten minutes east, north four degrees, thirty-five minutes and nineteen seconds east two and one-tenth feet intersect line 1-2 of survey No. 374, the *Micawber lode claim*, at south seventy-seven degrees and fifty-eight minutes east two-tenths of a foot from corner No. 2, one thousand three hundred and seventy-nine and twenty-three hundredths feet to corner No. 2.

Thence, second course, magnetic variation twenty-three degrees ease, north sixty-two degrees and nineteen minutes west one hundred and fifty and thirty-one hundredths feet intersect line 2-3 of said survey No. 374, at north fifty-four minutes west one thousand four hundred and forty-two and seventy-one

hundredths feet from corner No. 2; six hundred and sixty-five feet to corner No. 3;

Thence, third course, magnetic variation twenty-two degrees and forty-five minutes east, south eleven degrees and thirteen minutes east nine hundred and seven and sixty-four hundredths feet intersect line 2-3 of said Lone Pine lode claim, one thousand six hundred and thirty and two-tenths feet to corner No. 4.

Thence, fourth course, magnetic variation twenty-four degrees and forty-five minutes east, south sixty-two degrees and nineteen minutes east one hundred and eighty-two and thirty-one hundredths feet to corner No. 1, the place of beginning; the survey of the lode as above described extending one thousand four hundred and sixty-seven and seven-tenths feet in length along said Last Chance vein or lode. *Expressly excepting and excluding* from these presents all that portion of the ground hereinbefore described embraced in said mining claim or survey No. 374 and that portion of said *surevy* No. 365 in conflict with said Lone Pine claim and also all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground, the granted premises in said lot No. 363 containing fifty-eight acres and three hundred and forty-five thousandths of an acre of land, more or less.

NOW KNOW YE, That there is therefore hereby granted by the UNITED STATES unto the said James Clark and to his heirs and assigns the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that

portion of the said Lone Pine, Pearl, Surprise and Last Chance veins, lodes or ledges and of all other veins, lodes and ledges throughout their entire depth, the tops, or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 363, extended downward vertically although such veins, lodes or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side-lines of said premises.

PROVIDED, That the right of possession to such outside parts of said vein, lode or ledge shall be confined to such portion thereof as lie between vertical planes drawn downward through the end-lines of said Lot No. 363, so continued in their own direction that such planes will intersect such exterior parts of said vein, lodes or ledges;

AND PROVIDED FURTHER, That nothing herein continued shall authorize the grantee herein to enter upon the SURFACE of a claim owned or possessed by another.

TO HAVE AND TO HOLD, said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to his heirs and assigns forever; subject nevertheless to the above mentioned and to the following conditions and stipulations:

FIRST: That the premises hereby granted, *with the exception of the surface*, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies out-side of the boundary of said

granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

SECOND: That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of the courts.

And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

THIRD: That in the absence of necessary legislation by Congress, the Legislature of Washington may provide rules for working the mining claim or premise hereby granted, involving easements, drainage, and other necessary means to its complete development.

IN TESTIMONY WHEREOF, I, WILLIAM McKINLEY, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand at the City of Washington the second day of March in the year of our Lord one thousand eight hundred and ninety-nine and of the Independence of the United States the One hundred and twenty-third.

By the President: WILLIAM McKINLEY
(Seal United States Land Office) By T. M. McKEAN
Secretary.

C. H. BRUSH,

Recorder of the General Land Office.

Recorded Vol. 312, pages 153 to 160 inclusive.

Filed for record on the 6th day of January A. D.
1903, at 10.05 P. M. at the request of C. P. Robbins,
and recorded Jan. 7th, 1903.

A. S. SOULE,
County Auditor.

By Thos. F. Barrett,
Deputy.

State of Washington,
County of Ferry,—ss.

CERTIFICATE OF TRANSCRIPT.

I, A. C. MacNulty Auditor of said County, do hereby certify that the foregoing is a true and correct copy of Patent to Lone Pine, Surprise, Pearl and Last Chance Lode Mining Claims as the same appears of record on page 109 record of Patents volume number One, of the records of said County.

WITNESS my hand and official seal, this 21st day of April A. D. 1919.

A. C. MACNULTY,
County Auditor.

By _____, Deputy.

[Endorsed]: No. 3691. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 27, 1921. F. D. Monckton, Clerk.

Filed in the U. S. District Court, Eastern District of Washington. Aug. 27, 1920. W. H. Hare, Clerk.

Filed in the
U.S. District Court
Eastern District of Washington
Aug 27, 1920.
by W. H. Hare
Clerk.

PL 31

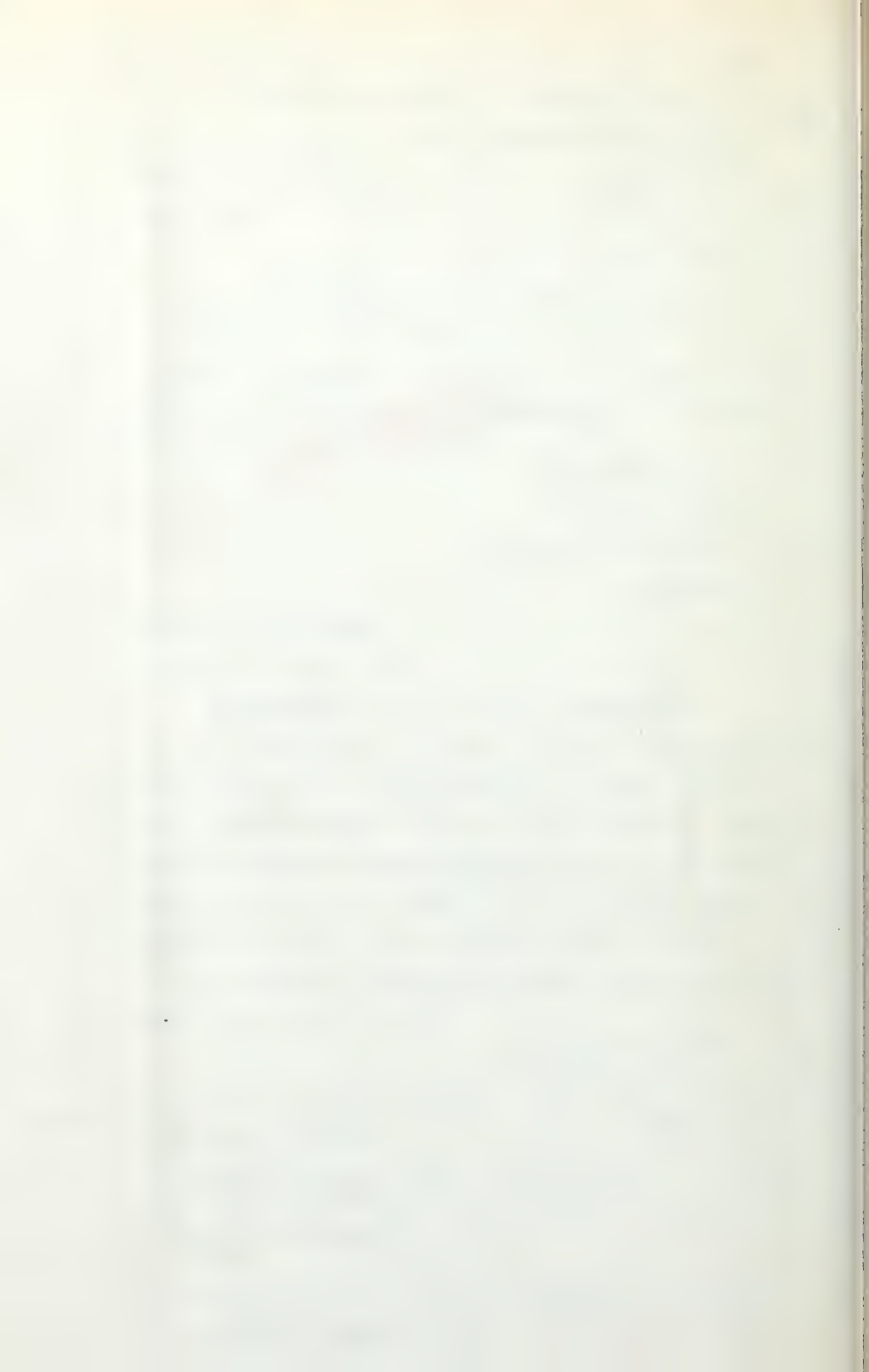


No. 3571
United States Circuit Court of Appeals
For the Ninth Circuit:

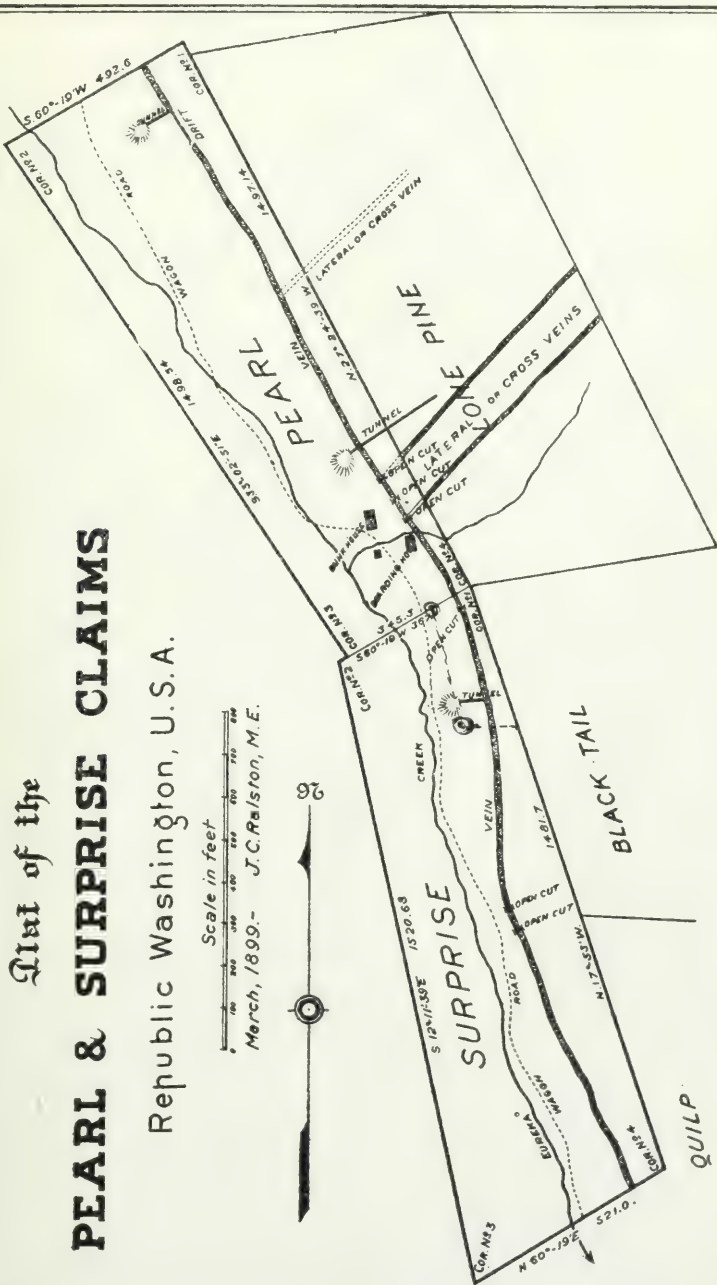
Filed
May 27, 1921

F. D. MONCKTON
Clerk.

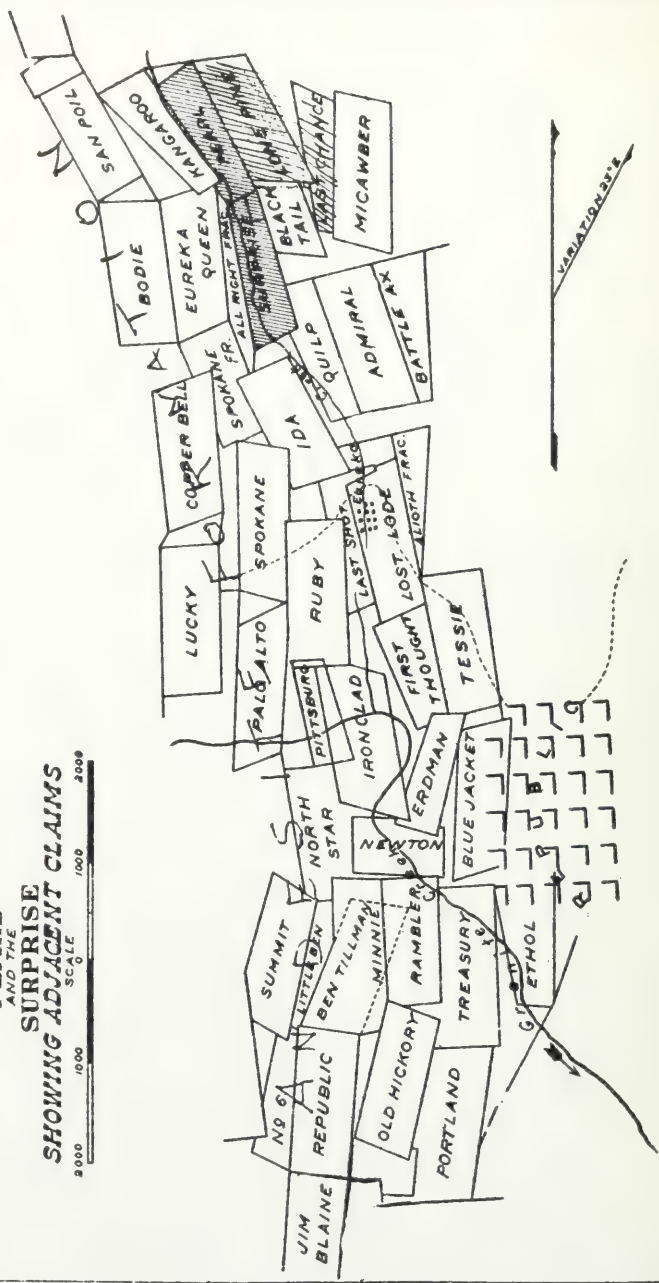
140



Defendant's Exhibit No. 14.



Map of the
PEARL
AND THE
SURPRISE
SHOWING ADJACENT CLAIMS
SCALE
2000 1000 2000



[Endorsed]: Filed in the U. S. District Court,
Eastern District of Washington. Aug. 27, 1920.
W. H. Hare, Clerk.

No. 3691. United States Circuit Court of Appeals
for the Ninth Circuit. Filed May 27, 1921. F. D.
Monekton, Clerk.

Defendant's Exhibit No. 15.**COPY OF J. C. RALSTON'S REPORT ON THE
LONE PINE SURPRISE CONSOLIDATED
GROUP OF MINES AT REPUBLIC.**

At your request I submit the following brief report on the Lone Pine-Surprise Con. Mines in Republic, Washington. I purposely omit a good deal of extraneous matter, as to the accessibility etc., knowing that you are familiar with the ground. A map and eight sheets of sections accompany and illustrate this report.

This group consists of the Last Chance, Lone Pine, Pearl and Surprise, all contiguous, patented claims, lying on the east side of a gentle gulch in the heart of Republic Camp. Elevation about 2800 feet. They are situated within but near the east boundary of the porphyry zone in which the ore bearing fissures of Republic are found.

VEIN CHARACTERS.

There is a regular gangalia of veins included within the group. The enclosing walls are porphyry. The veins vary in width from 3 to 18 feet, dipping to the east and south from 75% to 90%. The Pearl-Surprise vein which outcrops for 3000 feet has a serpentine strike of about north 18% west, while the laterals or cross veins of the Lone Pine, all about parallel, strike north east, with intermittent outcrops. The vein filling is chalcedonic quartz, sometimes contaminated with andesetic breccia and inclusions of the country rock. Analyses reveal an extremely silicious quartz, 91 to 94% silicate the balance made up of small per centages of iron, soda, aluminum and the

precious metals. The veins thus far are usually exempt from disordering influences of cross courses or faults. The values are wholly in gold and silver which are very largely in the metallic state, microscopically impregnating the quartz.

DEVELOPMENT.

On the Last Chance;—

Beyond some surface cuts along the outcrop of the Last Chance vein there has been no work done on this claim to develop the vein upon which this claim is located. The vein outcrops more or less continuously for a distance of about 425 feet. The value from the cuts run from about \$1. to \$3. The drift from the Lone Pine on #2 lateral has been run into Last Chance ground, following the vein and in the vicinity of the side-line cross-cutting contaminated vein matter for 100 feet without exposing the hanging or south wall. This lateral, no doubt continues diagonally across the Last Chance. There are about 128 linear feet underground workings on this claim. On the Lone Pine the greatest amount of development has been done. An adit tunnel has been run northerly from near the south end of the Lone Pine. This tunnel cuts latteral vein #1.9 feet wide, 20 feet from the portal, with an average value of about \$5. per ton. Eighty feet further in lateral #2 was cut, showing a width of 16 feet of clean quartz averaging in value \$20. per ton. At a distance of 190 feet further Latteral #3, was cut revealing a width of 3 feet and values of about \$7. per ton, while at a point 460 feet from the portal of the tunnel cross-vein #4 was

cut, disclosing a width of six feet between walls, running in value from \$18 to \$33.

At a point on the Pearl vein, 360 feet north of the boarding house another adit tunnel was started, cross-cutting the pearl vein and is now in 236 feet. This tunnel Adit #2 is being run to cut latteral #4 at a depth of 80 feet below Adit #1.

No work has been done on latteral #1. altho' this vein shows 9 feet wide where it was cut by Adit #1. It assays \$4. at that point and at a point 100 feet west-erly its outcrop assays \$6.

Latteral #2, shows the largest bady of ore yet opened. From the turn sheet at the intersection of Adit #1, and this latteral, a drift 100 feet long has been run in ore all that distance, which averages \$8, per ton, and 12 feet wide under a height of 105 feet. The breast is 12 feet wide all in ore. East-erly from the turn sheet a drift has been run 365 feet passing out the Lone Pine side-line, through the "V" Fraction (Not owned by the Company) and on into the Last Chance. The first 225 feet of this easterly drift a splendid body of \$20, ore has been opened, 12 feet wide and 105 feet below the surface. This lateral, like its parallel associates has a slight dip southerly. Half way between the turn-sheet and the east side-line, a winze has been sunk thus far 30 feet deep in which this #20, ore shoot continues with slightly increasing values with depth. A drift east-erly has been run on lateral #3, 115 feet, disclosing 3 feet of \$7, ore. This body of ore has not however been included in the calculations of the ore in sight. In fact all ore-shoots of less than \$8, value have not

been considered in this report. Another splendid ore body has been opened in #4 lateral. From the intersection with this vein a drift has been run easterly 150 feet. The first 100 feet passing through ore averaging 4 feet wide and \$33, per ton, under a depth of 170 feet: while in the west drift the first 30 feet average \$18, sixty feet beyond the \$18, ore, another shoot of \$12 ore has been cut. This shoot has been penetrated 10 feet to date with 4 feet of \$12 ore in workings on the Lone Pine.

ON PEARL

At the south of this claim near the boarding-house a shaft 44 feet has been sunk in the vein. Here the values are low averaging \$ per ton. A number of surface cuts have been made, as shown on plan, exposing the Pearl vein. Their values however are low. At the north end a cross-cut 80 feet long has been run, which cuts the vein 11 feet wide and 70 feet deep. From this a drift was run 20 feet north and 80 feet south. This shoot has been estimated at 11 feet wide 100 feet long and 70 feet deep. Some assays taken close to the north end-line from the croppings gave \$45, per ton in gold and silver. There are 234 feet workings underground on the Pearl.

ON SURPRISE

At the south end of this claim a cross-cut tunnel was run which cut the vein 4 feet wide at a depth of 100 feet. A drift was run north on the vein for 160 feet, and passed through a shoot of ore 3 feet

wide and 70 feet long, under a depth of 100 feet, which assays \$30, per ton. Almost over the north end of this drift a shaft has been sunk 45 ft. deep, with a drift from its sole 30 ft. north. This working is in a \$40, shoot of ore 5 ft. wide. The south side of this shaft near the bottom reveals the shoot dipping to the north, as shown in sections.

About the centre of the claim another cross-cut tunnel, starting at the wagon road was driven 165 ft. where it cuts the vein, whence drifts were driven north 160 ft. and south 263 ft.

The north drift encountered a shoot of ore 3 ft. wide by 100 ft. long, and the south drift a shoot 3 ft. wide by 130 ft. long—the former yields an average of \$10, per ton, and the latter \$30, per ton. At a point in the south drift 100 ft. from the turn-sheet a raise has been made to a short tunnel (see section B-B) The total workings on the Surprise aggregate 1105 feet.

AGGREGATE WORKINGS.

ON LAST CHANCE.....	128 ft.
ON LONE PINE.....	1813 ft.
ON PEARL.....	234 ft.
ON SURPRISE.....	1105 ft.

3270 Ft. Total to Date.

ORE IN SIGHT.

In calculating the ore reserves no ore has been estimated below present workings nor are the horizontal limits of shoots assumed to extend beyond present faces, where the limits are not already known.

That all the shoots have reasonable vertical depths is moderately assumed, and such as are undertermined horizontally may be assumed to have some additional length. These assumptions however do not enter into the calculations. The experience in the camp justifies such assumption.

ON LONE PINE

The lateral #2, see section ("D-D") 12x130 Ft. x 225 Ft. equals 27000 Tons at \$20, per ton equals \$540000.00. In lateral #3.

12x100x105 Ft. Equals 9692.307 Tons at \$8, per ton equals \$77,538.46. In lateral #4.

4x100x170 Equals 5270.769 Tons at \$33

equals	172615.38
--------	-----------

4x30x170 " " 1569.23 " " \$18 " "	28246.14
-----------------------------------	----------

4x10x170 " " 523.076 " \$12 " "	6276.912
---------------------------------	----------

Total gross value Lone Pine. \$824676.89. On Pearl 11x70x100, equals 5923.076 Tons at \$8, equals \$47384.60.

On Surprise At south end. 3x70x100 equals 1615.38 tons at \$30, per ton Equals \$48461.52

5x30x45 " " 519.23 " " at \$40. " "	20769.20
-------------------------------------	----------

South Centre shoot;

3x40x130, equals 2100 tons at \$30, per ton equals \$63000.

North Centre shoot;

3x70x100 equals 1615.38 tons at \$10, per ton equals	\$16153.90
--	------------

Total Gross value of Surprise \$148348.62.

Grand total gross \$1020446.12.

It is calculated in the light of experience in this camp, that these ores can be treated at a cost of \$3, per ton and with mining at \$2, per a total of \$5.00 per ton. The gross tonnage is 55788 at \$5, equals \$278940, this from the gross value \$1020446.46 leaves a net value for the ore in sight of \$741506.00.

TREATMENT.

The ores of this mine are susceptible of economical treatment by the modified cyanide process, as already in camp on a large scale at a cost of \$2.50 per ton.

FUTURE DEVELOPMENT.

The general conditions prevailing on this group are such as to render future development very economical. A three compartment shaft sunk say at a depth of 400 ft. near the portal of #1. Adit makes it.

[Endorsed]: Copy Ralston's Report. Lone Pine-Surprise Mines. Filed in the U. S. District Court, Eastern District of Washington. Aug. 27, 1920. W. H. Hare, Clerk.

No. 3691. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 27, 1921. F. D. Monckton, Clerk.

Defendant's Exhibit No. 32.

THE C. M. FASSETT CO.

ASSAY OFFICE AND ORE TESTING WORKS.

207-209-211-213 Wall St.

Memorandum of Assay Made for

Spokane, Washington, Aug. 24, 1920.

Arthur Lakes, Jr.

Sample Mark.	Copper at . . cts. per lb.	Lead at . . cts. per lb.	Assay Value Per Ton of 2,000 Pounds Avordupois.			Total.
			Silver at 100 cts. per oz.	Gold at \$20.67 + per. oz.		
Per Cent.	Dollars Cts.	Per Cent.	Dollars Cts.	Ounces. 10ths.	Dollars. Cts.	Dollars. Cts.
750 A.			9 7	9 70	— 56	11 57 21 27
No. 78290	{ All samples saved for one year. Pulps can be had }			THE C. M. FASSETT CO.		
Charges, \$1.50	{ from these samples for check assays, at any time. }			K		

[Endorsed]: Filed in the U. S. District Court,
Eastern District of Washington. Aug. 27, 1920.
W. H. Hare, Clerk.

No. 3691. United States Circuit Court of Appeals
for the Ninth Circuit. Filed May 27, 1921. F. D.
Monckton, Clerk.

Defendant's Exhibit No. 33.

C. M. TREVITT, Assayer

Certificate of Assay.

Samples of Last Chance Mine.

Republic, Wash., Aug. 21, 1920.

No.	Description.	Oz.	Gold		Oz.	Silver		Total Value
			10ths	Value		10ths	Value	
786A		06	1	20		5	50	1 70
787A		04		80		5	50	1 30
788A		04		80		4	40	1 20
789A		06	1	20		5	50	1 70

C. M. TREVITT, Assayer.

C. M. TREVITT, Assayer

Certificate of Assay.

Samples of Last Chance Mine.

Republic, Wash., Aug. 21, 1920.

No.	Description.	Oz.	Gold \$20.00		Oz.	Silver \$1.00		Total Value
			10ths	Value		10ths	Value	
778A		16	3	20		7	70	3 90
779A		16	3	20	1		1 00	4 20
780A		17	3	40		9	90	4 30
781A		12	2	40		9	90	3 30
782A		33	6	60		9	90	7 50
783A		10	2	00		5	50	2 50
784A		20	4	00		6	60	4 60
785A		08	1	60		5	50	2 10

C. M. TREVITT, Assayer.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Aug. 27, 1920. W. H. Hare, Clerk.

No. 3691. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 27, 1921. F. D. Monckton, Clerk.

IN EQUITY

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTHPORT SMELTING & REFINING
COMPANY, a corporation,

Appellant,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANT.

On Appeal from the United States District Court for the
Eastern District of Washington, Northern Division.

JOHN P. GRAY,
Coeur d'Alene, Idaho,
JOHN H. WOURMS,
Wallace, Idaho,
Attorneys for Appellant.

FILED
SEP 27 1911
F. D. MORRIS
CLERK

IN EQUITY

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTHPORT SMELTING & REFINING
COMPANY, a corporation,

Appellant,

vs.

LONE PINE-SURPRISE CONSOLIDATED
MINES COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANT.

On Appeal from the United States District Court for the
Eastern District of Washington, Northern Division.

JOHN P. GRAY,
Coeur d'Alene, Idaho,
JOHN H. WOURMS,
Wallace, Idaho,
Attorneys for Appellant.

situated in the Republic Mining district in the State of Washington.

The appellee is the owner of the Last Chance mining claim.

The accompanying diagram shows the relative location of the claims.

The suit is one involving extralateral rights beneath the surface of the Last Chance claim of appellee. It is a suit in equity in the usual form seeking to quiet title, for an accounting for ores heretofore mined by appellee and for an injunction.

The plaintiff (appellant) asserted its right to a segment of the Black Tail vein beneath the surface of the Last Chance claim based upon its ownership of the apex thereof in the Lone Pine claim.

THE COMPLAINT.

In substance, the complaint charges that the plaintiff is the owner of the Lone Pine claim; that the Lone Pine is senior to the Last Chance claim; that within the claim is a vein known as the Black Tail vein, which at its apex enters the south end line and after traversing the Lone Pine claim for a distance, at its apex passes out of the east side line of the Lone Pine at a point approximately 618 feet from its southeast corner; that the vein dips in an easterly direction beneath the surface of the Last Chance claim and that the plaintiff is the owner of that part of the vein upon its downward course beneath the said Last Chance mining claim between planes, one drawn downward through the south end line of the Lone Pine claim extended easterly in its own direction, and the other parallel

NORTH



SURFACE MAP

PLAINTIFF'S
EXHIBIT

1

Scale 1" = 100'



thereto at a point drawn downward through the point of departure of said vein through the east side line of the Lone Pine claim.

QUESTIONS NOT CONTROVERTED.

It is not disputed that the Lone Pine claim of appellant is senior in point of time to the Last Chance claim of appellee.

There is no controversy over surface ground.

The title of the respective parties to their mining claims is not questioned.

CONTROVERTED QUESTIONS.

(1) It is claimed on behalf of defendant (appellee) that the Lone Pine location is based upon a discovery of a vein, which crosses the opposite side lines.

The appellant does not dispute that at the point where the notice of location was posted, there is a branching quartz vein which does cross the opposite side lines of the claim. The appellant, however, does maintain that at the time of the location of the Lone Pine claim, the Black Tail vein was known by the locators to exist within the Lone Pine claim, had been discovered by them, contributed to the delineation of the lines of the claim, and was also a discovery or original vein of the Lone Pine claim.

(2) The appellee further maintained that the vein, which crosses the easterly side line of the Lone Pine claim, is not an extension or continuation of the Black Tail vein and does

not cross the south end line of the claim, but on the contrary crosses the west side line.

(3) That conceding that the Black Tail vein crosses both the south end line and the east side line, the plaintiff was, nevertheless, attempting to pursue the vein on its course or strike and not on its dip or downward course.

THE DECISION OF THE COURT.

The court below expressly declined to pass upon the last two questions, but based its decision solely upon the first question. The court held that there could be but one discovery or original vein in a claim and that the vein which exists at the point where the discovery notice was posted by the locators crosses the opposite side line of the claim and that, therefore, even though the other vein was known at the time of the discovery, that it was not a discovery or original vein and the extralateral rights of the Lone Pine claim are controlled by the vein found at the place where the discovery notice was posted.

APPELLANT'S POSITION.

The position of the appellant is that there may be more than one discovery or original vein in a claim; that the point of discovery fixed in the location notice or the point at which the notice is posted is not controlling in determining whether a vein in the claim is an original vein, and that if there is a vein within the claim which was known at the time of discovery and which it was sought to cover by the location, that it is a primary or original vein, and if such vein passes through an

end line, then the end lines of the claim as located are fixed as end lines for all veins.

The trial court, finding that the vein at the point where the discovery notice was posted crossed both side lines and controlled the extralateral rights as to all other veins within the claim, whether known at the time of location or not, dismissed the plaintiff's bill.

ASSIGNMENT OF ERRORS.

Appellant makes the following assignment or specification of errors upon which it will rely upon its appeal from the decree entered herein :

I.

The court erred in not holding that the Black Tail vein within the Lone Pine claim was a primary vein or original vein.

II.

The court erred in finding, holding and deciding that the Black Tail vein within the Lone Pine claim is a secondary or incidental vein.

III.

The court erred in holding and deciding that there could be but one primary, original or principal vein within a mining claim.

IV.

The court erred in not holding that the Black Tail vein, at its top or apex, entered the south end line of the Lone Pine

claim and passed out of the east side line thereof at a point 589 feet from the southeast corner of said claim, and that the vein, being known at the date of location of the Lone Pine claim, the extralateral rights thereon became fixed and the end lines of the claim as located became the end lines for extralateral rights upon all veins.

V.

The court erred in not holding and deciding that the Black Tail vein entered the south end lines of the Lone Pine claim and departed therefrom at a point 589 feet from the southeast corner.

VI.

The court erred in not holding that where a vein, known at the date of discovery and location of a claim, extends through one end line of that claim that the extralateral rights upon that vein and all other veins are controlled by the end lines of the claim as located.

VII.

The court erred in finding, holding and deciding that the defendant was entitled to any part of the Black Tail or No. 2 lode, vein or ledge beneath the surface of the Last Chance claim and between vertical planes, one drawn downward through the south end line of the Lone Pine claim extended in its own direction easterly, and the other parallel thereto and passing through the east side line of said Lone Pine claim at a point 589 feet from the southeast corner thereof, measured along said side line, and in not decreeing said vein within said

planes beneath the said Last Chance claim to belong to this plaintiff.

VIII.

The court erred in making and entering its decree herein in favor of the defendant and in dismissing the bill of complaint of the plaintiff.

IX.

The court erred in not holding, finding and deciding that the ore bodies in controversy beneath the surface of the Last Chance claim were a part of the Black Tail vein, the top or apex of which was within the Lone Pine claim and that the said claim was so located with reference to the said vein that the said ore bodies were a part of the Lone Pine claim and the property of the plaintiff.

ARGUMENT.

THE BLACK TAIL IS A PRIMARY OR ORIGINAL VEIN OF THE LONE PINE CLAIM.

It may be stated that if a discovery or original vein of the Lone Pine claim passes through either of the end lines thereof, that then the end lines of the claim as located become end lines for all veins within the claim.

If the vein at the point where the location notice was posted is the only original or discovery vein of the Lone Pine claim, the side lines of that claim become end lines and the appellant cannot succeed.

On behalf of the appellee, it has been asserted that there

can be but one original or primary vein in a claim; that the vein disclosed at the point where the notice is posted or at the point fixed as the discovery point is the only original or primary vein of the claim, and this, irrespective of what actually is discovered or what is actually known or what actually controlled the locators in laying the lines of the claim upon the ground.

On behalf of the appellant, we assert that there may be more than one primary or original vein; that the point of discovery fixed in the notice or the point at which the notice is posted is not controlling and that if there be a vein in the claim known at the time of the location which the locator sought to include in his location and which aided or controlled in the laying of the lines of the claim upon the ground, that it is an original or discovery vein.

The appellant maintains that the vein (called by appellant's witnesses the Black Tail and by the defendant's witnesses the Lone Pine No. 2 vein) was known at the time of the location of the Lone Pine claim; that its prominent outcrop at Station 545 had been observed by and was known to them at that time; that the locators of the Lone Pine were seeking to locate and did locate an extension of the Black Tail claim and vein; that the outcrop of the Black Tail vein had been observed by them in the Black Tail claim up to within a short distance of the south end of the Lone Pine claim prior to perfecting their location. The knowledge of the location of the Black Tail claim and the outcropping of the Black Tail vein therein and the knowledge of the outcrop at Station 545 was a determining in-

fluence with the locators in placing the lines and corners of their claim and that they were seeking to cover the vein now called by them the Lone Pine No. 2 by their location.

WHAT IS A PRIMARY OR ORIGINAL VEIN.

It may be of advantage first to determine what is an original vein according to the interpretation which has been placed upon the mining statute. The question was squarely presented and squarely decided by Judge Bourquin in

Clark-Montana Realty Co., v. Butte & Superior Copper Co., 233 Fed. 547.

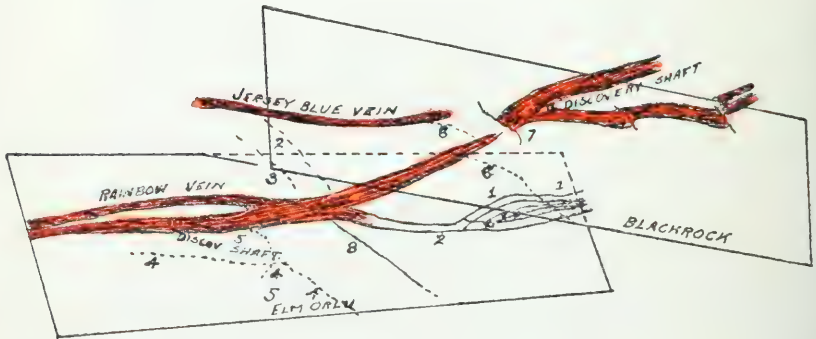
In that case on page 571, Judge Bourquin says:

"No discovery shaft was required when the Blackrock was located. Both the Jersey Blue and the Rainbow were discovered when the location was made, or at least before the patent entry. Evidently the cropping of the two veins gave the appearance of one continuous east-west vein and the location was made accordingly. Neither the Jersey Blue nor the Rainbow is a secondary vein. Both are primary. The Jersey Blue overlaps the Rainbow. Extralateral rights based on it extend east beyond where the like rights based on the Rainbow begin. Indeed, taking the course of the Jersey Blue where fixed by plaintiff south of the Rainbow it is probable it crosses the Black Rock south side line east of the Elm Orlu east end line. That the Rainbow crosses both side lines is not controlling. There can be but one set of end lines, and if the located end lines fix extralateral rights upon one vein,

as they do upon the Jersey Blue, they fix them upon all veins."

We reproduce here the sketch of the claims involved accompanying the opinion as found at page 552 of the 233 Federal.

NORTH



1 Pile at elevation Blackrock 1100.

2 Creden at Orlu 1100.

3 " " " 1200.

4 Copper " " 800.

5 " " " 1400.

6 Jersey Blue as claimed by plaintiff.

7 Deadwood near surface.

8 Unnamed "Blue" vein

Rainbow and Jersey Blue at Surface

The court found the discovery of the Black Rock claim to have been made upon the Rainbow vein, which it also found

crossed the opposite side lines of the Black Rock. It found the Jersey Blue vein to enter the west end line of the Black Rock, to pass through the Rainbow and to depart through the south side line of the Black Rock at a point not fixed. In any event, it found that the discovery point was upon the Rainbow vein which crossed the opposite side lines and it found that the Jersey Blue vein entered through one of the end lines. The court held both veins to be primary veins and both to have contributed to the marking of the claim upon the ground.

The discovery was found to be upon the Rainbow lode. If the Rainbow constituted the only original or primary vein of the Black Rock claim, then the extralateral rights upon all other veins within the claim would be bounded by vertical planes drawn downward through the side lines and the Rainbow could have no extralateral rights except through the end lines of the Black Rock claim. As there could be but one set of end lines, the Jersey Blue likewise could not have extralateral rights south of the south side line of the Black Rock claim.

Judge Bourquin expressly found that the Jersey Blue vein did not extend to the discovery on the Rainbow and did not extend in that direction, and expressly found that the Rainbow lode did not cross the east end line.

This was one of the controverted questions in the Elm Orlu case concerning which a vast amount of testimony was introduced. It was strenuously urged on behalf of the Clark-Montana Realty Company that the Rainbow vein crossed both side

lines and that therefore no extralateral rights could be had on the Jersey Blue or Creden or Rainbow south of the south line of the Black Rock claim beneath the Elm Orlu claim. Although the court held the vein upon which the location notice had been posted and where the so-called discovery shaft was later sunk crossed both the side lines, it also held that the end lines as fixed on the ground and in the patent were the end lines for all veins including the Rainbow, because the Jersey Blue vein passed through one of the end lines and evidently its outcroppings had influenced the locators in marking the claim.

The judgment in that case gave to the Butte & Superior company, extralateral rights beneath the Elm Orlu,

(1) Upon the Rainbow east of the apex crossing of the Rainbow through the north side line of the Elm Orlu;

(2) Upon the Creden vein for that portion thereof which apexed within the Black Rock;

(3) Upon the Pyle vein for that portion thereof which apexed in the Black Rock;

(4) Upon the Jersey Blue vein from the westerly end line to the point where it departed from the south side line of the Black Rock.

This decision of Judge Bourquin is squarely in point and squarely in support of appellant's view. There as here, the location notice was posted upon a vein which was afterward found to cross the opposite side lines of the claim. There as here, another vein, which was known at the time of the location of the claim, passed through an end line and out of a

side line just as the Black Tail vein does in this case. There was no continuous outcrop in the Black Rock claim; the Jersey Blue outcropped at various places in the westerly portions of the claim and the Rainbow at various places in the easterly; there was at least 150 or 200 feet of intervening space between the two where there was no outcrop. There as here, no discovery shaft was required.

Judge Bourquin held that the locator evidently saw and discovered both outcrops and believed he was locating a vein running lengthwise of the claim. Subsequently it appeared that the discovery notice was placed upon a vein which crossed the opposite side lines, but the other vein crossing through an end line, the court expressly said, "That the Rainbow crosses both side lines is not controlling," and expressly held that both veins were primary veins.

The trial court in this case recognized that such was the holding in the Elm Orlu case and differs with Judge Bourquin as to the interpretation of the statute. The comment of the trial judge in this case upon that decision is as follows:

"Ordinarily, I would feel constrained to defer to the superior knowledge and experience of the learned judge who wrote that opinion, in matters of this kind, but if the question here involved was at all decisive of the rights of the parties in that case, I confess I cannot understand why it should receive such scant consideration at the hands of the Court in a well considered opinion, or why the question was not even referred to by either of the appellate courts to which the case was carried.

248 Fed. 609

249 U. S. 11, where the title of the case is reversed."

In answer to that language of the court in this case, it may be said first, that while Judge Bourquin is not verbose in a discussion of the question, he is explicit and clear and that very question formed the basis for practically the entire decree.

With reference to the wonder expressed by the trial judge as to why that question was not referred to by either of the appellate courts to which the case was carried, it is but proper to suggest that the trial court undoubtedly forgot that in that respect the decision of Judge Bourquin was against the Clark-Montana Realty Company and in favor of the Butte & Superior company, and the Clark-Montana Realty Company did not appeal from the decree. The Clark-Montana Realty Company, and its counsel accepted that interpretation. The trial court below seemed to place entire reliance upon what he called the discovery vein "which formed the basis of location and patent."

The veins which determine and control the direction of extralateral rights are referred to as original veins, sometimes as primary veins and sometimes as discovery veins. The veins whose extralateral rights they control are referred to as secondary, accidental or incidental. This court refers to them as secondary or accidental veins.

St. Louis M. & M. Co., v. Montana M. Co., 104 Fed. 664.

We assert that the Lone Pine vein if it was known at the time of location and if it was sought to be included within the claim, and if it constituted a function in forming the lines of the claim, was one of the discovery veins of the Lone Pine claim. We are content to rest upon the construction of the

statute in this respect given by Judge Bourquin, a man experienced both in the mining law and in practical mining. His view is supported by reason.

Suppose a great vein to extend through the lines of a claim, to outcrop at irregular intervals through that claim. Suppose there be a little cross vein, the outcrop of which at one point is approximately in line with the outcrop of the great vein extending lengthwise of the claim, and suppose the locator happened to place his discovery notice at this outcrop of the cross vein believing he was locating upon the outcrop of the vein which runs lengthwise of the claim. Is that vein which runs lengthwise and outcrops at intervals through the claim to be held to be a secondary or incidental or accidental vein and the rights of the claim to be solely fixed by the fortuitous discovery later on that the notice happened to be posted upon an outcrop of a small cross vein? We apprehend that the rule as announced by Judge Bourquin is the sensible, the reasonable and the correct rule.

The presumption is that the vein runs lengthwise and not crosswise of the claim as located. In *Enterprise M. Co., v. Rico-Aspen Con. M. Co.*, 167 U. S. 108, on page 115 Justice Brewer says:

“The presumption, of course, would be that the vein ran lengthwise and not crosswise of the claim as located.”

In other words, he who seeks to question the correctness of the end lines as fixed by the patent has the burden upon him

to show that the end lines therein described are not the correct end lines of the claim.

We assert that an examination of this record will show that the appellee has not sustained that burden, but that on the contrary the weight of the evidence is with the plaintiff.

THE FACTS AT THE DATE OF PATENT SURVEY AND ENTRY.

For the convenience of the court, we attach a copy of plaintiff's Exhibit No. 1, the surface map of the Lone Pine and Black Tail claims:

It is not disputed that at the date of the patent entry of the Lone Pine the Black Tail vein, as described by plaintiff's witnesses, was known to exist within the Lone Pine claim, and particularly at the outcrop at and near Station 545 or 203-C. (Station 203-C and Station 545 are the same or substantially the same).

The lode line of the claim as surveyed extended through the outcrop near that point and that outcrop constituted a function in forming the lines of the claim as surveyed for patent.

Mr. Ralston, the deputy mineral surveyor who made the patent survey, testified that he was taken upon the ground by one of the locators, Mr. Creasor. We quote the following from his testimony:

"After having gone over the property to ascertain the location of the various original stakes, we then proceeded to go over the general hill, ascertaining first the location of the end-line stakes. It seems that it is a requirement of the Federal law to lay down a theoretical lode line.

SURFACE MAP

PLAINTIFF'S EXHIBIT ①

to sh
end l

W
that
contu

THI

For
tiff's
Blac

It
the
with
part
(Sta
the s

T
the c
tion

M
pate
one
fron

Sometimes that lode line is defined by stakes, sometimes by works on the ground, and sometimes by a combination of both. And in order to lay that line intelligently, it was necessary to ascertain all of the physical facts on the ground in connection with the staking. I therefore looked up the discovery as marked on the official plat, the discovery improvement No. 1. We looked up the end line stakes and follow over the ground substantially along the territory which would be defined by the lode line through here (indicating). At the north end, from the north end line stake standing somewhere about where I hold my pointer, in the center of the north end line, and for a distance of perhaps 150 feet south, a rather sharp bit of topography is defined as shown by these contour lines, such as a man on the ground might call a hog back. At the lower or southerly end of the most prominent part of that feature of the topography some quartz and what appeared to be typical croppings of vein matter appeared, and fitted rudely the general direction of a straight line drawn through the center of the claim. Still further croppings were to be found perhaps in the vicinity of the Letter 'N' of the word 'Lone.' Still others again as the discovery cut was approached in the form of apparent croppings under old large trees, some of which stand today and others are down, and so on down to the discovery, continuing along that line on the theory of seeking to ascertain a justification for a lode line in that particular territory, viz., the center of the vein. Croppings were noted at a point westerly or perhaps northwesterly of the southwest end of the open stope.

Q. Just point that out.

A. That would be in the vicinity of No. 545.

Q. Also mark 203-C? A. Yes.

Q. On Exhibit 1. What kind of a cropping was that?

A. That was rather a strong quartz cropping, and

that was the last of any physical evidences of anything which would justify the definition of a lode line. The rest is wash and gulch, but it constituted, in my judgment, sufficient evidence to lay with a good deal of confidence a lode line substantially as it has been laid, defined as being the general direction of the vein.

Q. Was Mr. Creasor at these various places at one time and another with you in your visit?

A. I think so.

Q. This cropping—I want to call your attention to the cropping near the open stope. Was that observable for any distance from there.

A. Yes, quite a distance.

Q. Where can you see it?

A. Well, this is the whole—as these green contour lines show, this is a hill sloping southerly, and is visible from the territory further south in looking north.

Q. That is, from the Black Tail?

A. From the Black Tail, almost from any point on the Black Tail vein. It is particularly visible from the old Black Tail croppings. As for instance, in sighting along over here, from the extension of the Black Tail into the Lone Pine, one may see this whole face of the hill from about this point, namely 578 on up to substantially the top of the hill, or near the discovery cut; and at the present time also you can see these workings.

Q. Can you see those croppings today?

A. These croppings are rather conspicuous and can be seen quite plainly.

Q. Those croppings I understood you to say are quartz?

A. Yes, sir.

Q. Coming back again to the Black Tail, could you observe the croppings at that time of the Black Tail vein going up northerly or northwesterly through that claim?

A. Yes.

Q. Are they observable today, Mr. Ralston?

A. Quite conspicuously.

Q. What do they consist of? What is the character of that cropping there?

A. Well, they are croppings largely of quartz, some vein matter well defined along the side of the hill in the form, in many cases, of the little miniature escarpment there, 3 to 5 or 8 feet high, breaking the average slope of the hill enough to define this plainly.

Q. Then at the time, as I understand it, at the time you made your patent survey, there was known and observed by you and by the others who were there the croppings at 203-C and at the point marked discovery cut and on up at various places towards the north end of the claim? A. Yes.

Q. Therefore, I leave that, Mr. Ralston. What was your opinion at that time as to the course of the vein?

A. That it was a north-south vein or substantially north-south, a continuation in other words of the Black Tail." (R. pp. 171 to 175).

Mr. Creasor, who was a witness for the appellee, did not in any respect controvert this testimony.

Under this uncontroverted testimony, the vein at Station 545 or 203-C was known at the time of patent entry and it contributed to the direction in which the patent lines were run.

AT THE DATE OF THE LOCATION.

The evidence shows that the Black Tail, or as the appellee

calls it, the No. 2 vein, was known to the locators of the Lone Pine claim at the time of the location of that claim. The evidence shows clearly that the Black Tail claim and the vein therein, at the time of the location of the Lone Pine was known to the locators of the Lone Pine.

The actual location of the Lone Pine claim was made by Creasor and Ryan, both of whom are interested in the appellee company. Robbins, one of the others named in the location notice, is manager of appellee, while the fourth, Clark, is dead. No assistance could be expected by appellant from the original locators.

However, there are certain facts not dependent upon human testimony which impel to the conclusion that the locators of the Lone Pine knew of the vein at the point of the outcrop at Station 545 or 203-C at the time of the location of the claim. They are:

(1) The direction in which the claim is laid. It was certainly the outcroppings of quartz in a northerly and southerly direction which impelled the locators to lay their lines as they did;

(2) It is only reasonable to assume that a prospector when he discovers a vein on vacant land will take as much of that vein as the law permits. If it is worth locating at all, he wants the 1500 feet given by law, and it is contrary to experience to find a locator deliberately locating crosswise of his vein.

(3) The Black Tail claim had already been located at the date of location of the Lone Pine, as had also the Quilp, which

was the extension of the Black Tail on the south. Creason and Ryan, locators of the Lone Pine, actually located that as an extension of the Black Tail on the north. Creason testified that he placed the south end stakes of the Lone Pine next to the north end stakes of the Black Tail, except the southwest corner, which he placed over on the Black Tail because he thought the end line was crooked and was going to leave a fraction in there, (R. pp. 425-6). He also testified that on the day he staked the Lone Pine that Welty, locator of the Black Tail, was with him and that he saw and went to the discovery of the croppings of the Black Tail vein in the Black Tail claim, (R. P. 442-3).

Why did he place the corners of the Lone Pine adjacent to the Black Tail end line and corners, if not for the purpose of locating an extension and leaving no fraction in between? The Black Tail vein actually outcrops upon the surface to within a short distance of the north end line of the Black Tail and the south end line of the Lone Pine.

(4) The most prominent outcrop upon the Lone Pine claim is the quartz cropping at station 545 or 203-C. There the quartz stands out of the ground for several feet. Is it reasonable to suppose that these prospectors did not observe, that they were not controlled by, that outcrop in the laying of their lines? Creason and Ryan either placed their south end line next to the Black Tail for the purpose of locating the extension of the Black Tail or for the purpose of including within their lines this particular prominent quartz exposure. The more probable conclusion is that they believed it to be an

exposure of that vein in their claim and were locating the Black Tail extension.

When Mr. Ralston, the deputy mineral surveyor, went over the ground a year later, he reached the conclusion that such was the case that that exposure represented the outcrop of a vein which extended in a northerly direction through the Lone Pine claim.

Mr. Searls testified (R. p. 71) that before trenching was done upon the ground "there might readily have been suggested to the mind of a man who was walking over this area that the Black Tail vein which enters its southerly end line continues northerly through the limits of the claim and crossed its northerly end line."

(5) The first work performed by the locators was at this particular prominent outcrop and no work was done at the point where the discovery notice was posted until a year later.

All of these facts, which do not depend upon human testimony, impel to the conclusion that the cropping of quartz at the point where the notice was posted, the cropping of the vein at station 545 or 203-C and other croppings in the Lone Pine and the croppings within the Black Tail claim, in the language of Judge Bourquin, "gave the appearance of one continuous north-south vein" and the location was made accordingly.

THE FURTHER FACTS:

The relative dates of location of the several claims are as follows:

Black Tail, February 20, 1896

Lone Pine, February 28, 1896

Last Chance, February 29, 1896.

Concerning the locations the following witnesses testified:

John Welty, locator of the Black Tail and E. S. Babb, one of the persons originally interested in the Black Tail, testified for appellant.

Philip Creason, one of the locators of the Lone Pine and Surprise, and Charles Robbins, one of the locators of those two claims, testified for the appellee.

Thomas Ryan, one of the locators of the Last Chance and Lone Pine claims, and still interested in the appellee company, present in court, but not called by appellee, was finally called and examined and his testimony is found at pages 517 to 526 of the record.

Welty testified that Creason and Ryan camped with him and that he informed them there was some vacant ground on the north end of the Black Tail claim, and pointed it out to them. Creason admitted that he camped with Welty. He testified that he discovered the quartz at the point where he afterwards posted his notice on the 28th of February and that on the same day Ryan discovered the Last Chance claim. The claims were not staked on that day. That night at camp Creason wrote the notices of location and on the morning of the 29th returned to the ground and in company with Ryan and Welty posted the notices and staked their claims. The Last Chance notice gives the date of location as the 29th and the Lone Pine

as of the 28th. In any event, according to the testimony of Creasor, the Last Chance was located not later than the morning of the 29th of February.

Mr. Ryan, one of the locators of those two claims, expressly testified that he knew of the vein outcropping at Station 545 on the day he located the Last Chance claim. He describes it as being near the point where later a blacksmith shop was located on the Lone Pine claim (R. pp. 518-523). The position of that blacksmith shop is shown on the patent plat, Exhibit 12 (R. p. 684), and is in the immediate vicinity of Station 545. So that Ryan knew of that outcrop on the 29th day of February, the day the notice was posted and the claim staked. On pages 520 and 521 of the record Mr. Ryan testifies as follows:

“Q. I am not asking you how much you did. Now, when you located the Lone Pine claim you located it northerly and southerly, didn’t you?

A. That is the way I thought it was.

Q. What made you think so, Mr. Ryan?

A. Because that is the way the ledges run.

Q. Did you see an outcropping there?

A. I did, and I located the Last Chance there.

Q. That would be the day after you located the other?

A. I don’t remember.

Q. On the day you located the Last Chance, anyway, you could see the croppings at various places running up and down?

A. I could, sir.

Q. In a northerly and southerly direction?

A. I would not say.

Q. That way you located the claim, anyway?

A. Yes, the way I located the claim, I located it to take that in."

Mr. Welty testified that the first work done upon the Lone Pine claim was by Ryan and Creasor at the outcrop near Station 545. He testified that they were working there within a few days after the claim was located (R. p. 209). Ryan admitted that they had worked there, but he could not say just when (R. p. 520). Mr. Babb testified that he saw Creasor and Ryan working there within two weeks from the date of the location of the Black Tail (R. p. 214). Creasor testified he did not discover that vein at Station 545 until the 6th of March, subsequent to the time he claimed to have recorded his notice of location. Whether he did or whether he did not, is unimportant. Ryan, his co-locator, admitted that he did know of it on the day he made the location of the Last Chance—the 29th of February. It may be suggested that it is unreasonable to believe that Ryan did not inform him of this prominent outcrop and prominent quartz ledge at some time during the day or upon their return to camp that night. The witness Creasor, a little overtrained, undertook to say that he knew nothing about the bold outcrop at Station 545 until after he had recorded his location notice. He does admit that the first work done on the Lone Pine claim was at that point. The patent plat shows a little trench at the so-called discovery, but that trench was not put in until a year after the location

(Test. Robbins, R. P. 409). Creasor undertook to explain that the direction in which the Lone Pine was located was accounted for by the fact that he desired to get as many veins as he could and that by so locating it he would have 600 feet of each. He testified that in his opinion that the vein which he had discovered ran crosswise instead of lengthwise of the claim. His testimony in that respect is found at page 427 of the record, where in answer to a question he testified:

“Q. Did you at that time actually know which way the veins ran?

A. Yes, sir, certainly, they showed as plain as anything could be, every one of them, at the top of the hill.”

And again on cross examination (R. pp. 440-441) he testified as follows:

“Q. Was it your opinion from what you saw at that time (referring to the date of location) that these veins ran in an easterly and westerly direction?

A. Yes.

Q. How did you come to locate this claim in a northerly and southerly direction?

A. So as I would take all the veins in and all the quartz that was in sight and on the top of this ridge.”

His testimony is unbelievable and is clearly false. In the first place, it is contrary to the practice of prospectors to make locations in any such manner, and if they thought the vein were running east and west both that claim and the Last Chance claim would have been swung in the other direction. Ryan undoubtedly told the truth when he said that he thought the vein was running northerly and southerly. But Creasor

is not only disputed by own co-locator, he is disputed by other evidence that is uncontrovertible.

Prior to the time of the trial, the expert engineers for the appellee supervised extensive development for the purpose of undertaking to show that the little quartz vein disclosed at the point where the notice was posted ran crosswise of the claim. From early in February until the latter part of April they struggled in the effort to so trace it and were unsuccessful in tracing it to the side lines. Again, a month or so prior to the trial, renewed efforts were made and they were able with some breaks to following stringers across the side lines.

Mr. Wethered described the difficulties of the expert engineers for appellee in carrying on this development work (R. pp. 237 to 240).

Mr. Robbins, one of the locators, said that they went up to the claim in the September following the location; that he saw the veins were east-west veins, that is, northeast and southwest veins, but that he did not follow any of them nor did he determine where any of them crossed in or out of the claim. (R. pp. 410-411).

Also disputing Mr. Creasor's testimony is the fact that in the location notice which he himself prepared of the Lone Pine claim he states that he claimed 1500 linear feet on the Lone Pine running in a northwesterly and southeasterly direction. So also did he claim 1500 linear feet in the same direction on the Last Chance lode.

The location notices of the Pearl and Surprise claims, adjoin-

ing claims, were also shown in the patent record; they were located northerly and southerly, parallel to the Lone Pine.

Attention is called to the fact that in Mr. Ralston's survey in reporting on the veins, he pointed out what was evidently the opinion of the miners and engineers at the time, that the veins dipped to the east. The application for patent sets forth that the presumed general course or direction of the Lone Pine vein, lode or mineral deposit is shown on the official plat and there it is shown running lengthwise of the claim.

The court below in its opinion, in fact says that the No. 2 vein was perhaps known at the time of the discovery and was certainly known very soon thereafter.

From all of the facts, including that finding, it may be taken for granted that that vein was known at the time of the discovery and location of the Lone Pine claim, and that it contributed to the marking thereof. It also contributed to the delineation of the claim in the patent survey.

In the court below, it was strenuously urged by counsel for the appellee that inasmuch as the patent for the Lone Pine claim referred to the discovery trench, that that should be held to be the discovery vein, and yet, it is admitted by both Creasor and Robbins that that trench was not dug for a year after the location. The laws of Washington required no discovery trench or work.

The decision of Judge Bourquin in the Elm Orlu case is based upon a patent for the Black Rock which also refers to the discovery shaft on the Black Rock claim upon a vein which crossed the opposite side lines of the claim. Applying Judge

Bourquin's decision in the Black Rock case to the case at bar, both the small vein at the discovery and the Black Tail vein at Station 545 (203-C) were discovered when the location was made. It is admitted that they were discovered before the location was complete and before patent entry. Under the admissions of Ryan, one of the locators, they were both discovered before the Lone Pine claim was staked.

As in the Black Rock case, evidently the croppings of the two veins gave the appearance of one continuous north-south vein and the location was made accordingly; neither is secondary, both are primary.

For the purpose of showing that the patent to the Black Rock claim contained the same reference to the discovery shaft, we attach a copy of the patent to the Black Rock claim marked Appendix A.

On page 442 of the record, Creasor the locator of the Lone Pine claim, testified as follows:

“Q. It was your purpose, then, to locate several ledges with this claim?

A. Yes, it was, sure.

Q. Did you attempt to trace out any of these ledges at this time?

A. No, not before I located. Just where I could see.

Q. How far could you see this ledge that you say you found at the point where you marked the discovery?

A. Well, that evening I don't think I saw it any more than 20 or 30 feet, or maybe 50 or so.

Q. In which direction, 50 feet?

A. Why, in a northeast by southwesterly direction.

Q. At the discovery?

A. Yes."

And on page 427, he said that he put the location right through in a northerly and southerly direction so that it would catch all the veins on that hill. So Creasor intended to take in the veins which were in that area. An outcrop of one of them, the Black Tail or No. 2, was known to his associate Ryan, and undoubtedly to him.

THE OPINION OF THE COURT.

The trial court, as was its privilege, placed a construction upon the mining statute out of harmony with the construction which was placed upon the same statute in the Elm Orlu case. In the opinion supporting that conclusion, however, are certain statements with respect to facts which we desire particularly to call to the attention of this court. In the course of the opinion the court says:

"Furthermore, there was no known vein extending lengthwise of the Lone Pine claim at the time of location, or even at the time of patent." (R. P. 44).

We may reply by saying that there was no known vein extending crosswise on either of these occasions. The deputy mineral surveyor in his patent notice and also on the stand in this case testified that in his judgment the vein ran lengthwise of the claim. While the locator of the claim, for his own interest, today can say that he thought the vein which he dis-

covered ran crosswise of the claim, his very conduct in locating it as he did disputes any such self-serving testimony.

Then there is the presumption that the vein does extend lengthwise.

It is indeed rare that at either the time of location or the time of patent the locator or owner knows just where the vein does run with reference to the lines of his claim.

To this court, familiar with the practical side of mining, it is of course, unnecessary to say that it is rare indeed that a vein is so exposed at the time of location or for many years thereafter as to permit one to say just what its relation is to the lines of the claim. We need but again to call attention to the Black Rock-Elm Orlu litigation. Those mining claims had actually been worked from 1876 to the date of the trial in 1915 and it was a subject of controversy as to whether or not the Rainbow vein at that time crossed through the east end line or the north side line of the claim. So that it was in no sense essential that a known vein extending lengthwise of the Lone Pine claim should have been known at either time or at all.

The court makes the following further statement :

“There was nothing on the surface to indicate that the Black Tail vein extended that far to the north, and while vein No. 2 was, perhaps, known at the time of discovery and was certainly known very soon thereafter, yet that vein, so far as then known, extended crosswise of the claim, and there was not even a suspicion until years afterwards that it turned abruptly to the south, almost at right angles, and crossed the south end line, if indeed,

that fact can be said to be established at this time." (R. p. 44).

The statement in that excerpt from the opinion that there was nothing on the surface to indicate that the Black Tail vein extended as far north as the point where the notice was posted is disputed by the following facts:

(1) The Black Tail vein was for a long distance substantially a north-south vein. It cropped along the surface of the Black Tail claim. Across the gulch and on the Lone Pine claim there were other quartz croppings at Station 545, others in the vicinity of the point where the location notice was posted and still others at the north end of the claim. That is the indicia which to the prospector indicates the course of his vein. Even at the time of patent, the deputy mineral surveyor regarded it as extending in that direction.

The portion, however, of the statement of the court to which we particularly except and which we particularly criticize is as follows:

"Yet that vein, so far as then known, extended cross-wise of the claim and there was not even a suspicion until years afterwards that it turned abruptly to the south." (R. p. 44).

That statement that so far as then known it extended cross-wise of the claim is not supported by a single scintilla of evidence. The court in writing its opinion must have forgotten the testimony or disregarded the record. That vein did not outcrop for any considerable distance. There was a prominent outcrop at the point referred to at Station 545. If it extended very far from there it went under the wash and it required a

considerable development to show the course of the vein. At the time of patent there was nothing to show that the vein ran crosswise of the claim. Mr. Robbins, who was one of the locators, spent a couple of days on the claim in 1897. He saw the cropping on the Black Tail, or as he called it, the No. 2 vein, near Station 545. He saw quartz exposed north of Station 550; he did not attempt to follow any veins across the claim or to determine where they crossed in or out of the claim; he saw that they were northeast and southwest veins (R. p. 409-11). Creasor, who is still interested in the Last Chance claim, gave no testimony whatever to the effect that he thought that vein crossed the side lines or that he followed it across the claim. Ryan testified that he located the Lone Pine claim northerly and southerly because that was the way the ledges ran and that he located the Last Chance in the direction in which he did to take in the croppings that he saw at various places running up and down the hill. His testimony is as follows:

“Q. I am not asking you how much you did. Now, when you located the Lone Pine claim you located it northerly and southerly, didn't you?

A. That is the way I thought it was.

Q. What made you think so, Mr. Ryan?

A. Because that is the way the ledges run.

Q. Did you see an outcropping there?

A. I did, and I located the Last Chance there.

Q. That would be the day after you located the other?

A. I don't remember.

Q. On the day you located the Last Chance, anyway, you could see the croppings at various places running up and down?

A. I could, sir.

Q. In a northerly and southerly direction?

A. I would not say.

Q. The way you located the claim, anyway?

A. Yes, the way I located the claim, I located it to take that in." (R. pp. 520-521).

For the appellant, Mr. Ralston, the deputy mineral surveyor who surveyed the claim, testified that it was his judgment at the time of making the survey that the vein ran lengthwise of the claim. Mr. Babb, one of the locators of the Black Tail, testified that he thought it was the extension of the Black Tail at Station 545.

(3) The court includes the following statement in its opinion:

"The locators of the Last Chance claim knew that the discovery vein on the Lone Pine crossed the side lines and they had a right to assume, therefore, that no extra-lateral rights would ever be asserted in that direction." (R. P. 44-45).

This statement is unsupported by any evidence. It is contrary to the evidence of the very locators of the claim. In the first place, Ryan testified, as we have pointed out before, that he located the Last Chance claim along what he believed to be the Last Chance vein and that he could see croppings at various places running up and down in the direction in which he located the claim (R. p. 521). On page 520, he said he

located the Lone Pine claim and also the Last Chance in a northerly and southerly direction because that is the way the ledges run. Creasor, the other locator, testified that the ledge which he saw at the place where he posted his location notice he did not think he saw on the evening of his location more than 20 or 30 feet or maybe 50 feet in a northeast by southwest direction (R. p. 442).

Mr. Wethered described the difficulty which the expert engineers for the appellee had in developing the small vein shown at the discovery to show that it crossed the side lines of the claim. His testimony is found at pages 237 to 240 of the record. They struggled along from February to the latter part of April at which time they had been unable to trace the vein or any stringer of it across the side lines, and then later, just before the trial, they undertook the work again and did follow some stringers across the side lines. There was no outcrop of it across the claim and no work whatever done to show where it coursed until this law suit was commenced.

The statement in the court's opinion that locators of the Last Chance, therefore, knew that the discovery vein on the Lone Pine claim crossed the side lines is not supported by any testimony. It is contrary to the testimony and is disputed by the conduct of the locators themselves.

One other question involved in the court's opinion requires consideration. The learned judge seems to have misunderstood the position taken by plaintiff that all veins known at the time of the location are discovery or primary veins and

that if any one of them crosses either end line the end lines of the claim are end lines for all veins. The court says :

“All the authorities agree that side lines and end lines do not depend on the mere act of the locator.” (R. p. 46).

That is true, so that if the locator's primary or discovery veins or any one of them cross either of his end lines, that is an end line for all such veins.

The court further says :

“Had the discovery vein dipped and extended beyond the north end line of the claim, I fail to see how the right of the owner of the claim to pursue the vein on its downward course or dip beyond the end line could be defeated except by some person showing a prior right.” (R. p. 44).

The answer is, as Judge Bourquin said in the Elm Orlu case, if one of the veins known at the time of location actually crosses an end line, then the end lines limit the extralateral rights and no vein can be followed extralaterally through the end line.

Again the court below says :

“If this is true, why should side lines or end lines now depend upon the fortuitous circumstance that it has recently been discovered that vein No. 2 in fact crosses the south end line.” (R. p. 44).

If, as a matter of fact, vein No. 2, or the Black Tail vein, is a discovery or primary vein, the fact that it crosses the south end line fixes that as an end line. The question of what is a side line and what is an end line always depends upon what the court describes as “the fortuitous circumstance” of the discovery of the relation of the vein to the lines of the claim.

In most claims it is true there is only one discovery or primary vein. It makes no difference how many years it has been worked or what the owners of the claim or their neighbors believed the vein to be, when it is actually developed across the opposite side lines, they become end lines, and whether it be described as a "fortuitous circumstance" or not is immaterial.

The right extralaterally to a vein depends upon the relation of that vein at its apex to the lines of the claim, and it makes no difference whether that relation was known at the date of location or whether that relation is discovered forty years thereafter. In fact, it was only a short time previous to trial that the branching vein at the place where the notice was posted was found to cross the side lines.

This case but exemplifies the hazard of submitting a mining controversy to a judge unfamiliar with the mining law. From the reading of the court's opinion, one is impressed with the idea that the judge below carried in his mind the fact that it should be an easy matter to know when you locate a claim where the vein runs, what its direction is and what lines it crosses, and that if for a short distance it has a course in one direction that is proof that it continues in such direction indefinitely. All of these assumptions are denied by the experience of every one who knows anything about mines.

II.

THE BLACK TAIL VEIN IS CONTINUOUS FROM ITS
CROSSING OF THE SOUTH END LINE OF THE

LONE PINE CLAIM TO THE POINT WHERE IT
DEPARTS THROUGH THE EAST SIDE LINE.

The court below did not consider this question and made no finding upon it.

If this court should follow Judge Bourquin's view as expressed in the Elm Orlu case, then it will become necessary to pass upon one other question, namely, the question of whether or not the Black Tail vein bends to the east upon its course and crosses the east side line, as claimed by appellant, or whether the so-called No. 2 vein and the Black Tail vein are separate and distinct veins.

The Black Tail vein is developed for a great distance in the Black Tail claim and to the south thereof in the Quilp. A map, a copy of plaintiff's Exhibit No. 1, which has been incorporated above in this brief, shows the course of the Black Tail vein through the Black Tail claim and into the Lone Pine claim, and thence northerly around a bend in the vein to a point where it departs from the east side line of the claim 589 feet from the southeast corner of the Lone Pine claim.

The witnesses for both parties admitted that the Black Tail vein crossed the south end line of the Lone Pine claim. They did not exactly agree as to the precise point of crossing. (The end line of the claim is in a gulch where the wash is quite deep and where, on account of the sand and wash, it was difficult to perform surface development work).

Mr. Lakes, one of the witnesses for the defendant, admitted that the Black Tail vein extended to the sand winze (R. p.

386) and it was so marked upon the model and upon the map exhibits of the defendant (Deft's Ex. 27-28). All of the witnesses for the defendant admitted that the Black Tail vein at surface extended as far north as Station 558.

The witnesses for the appellant testified expressly that from the point where the Black Tail vein was admitted to be, it and the quartz of it could be followed continuously to the point of crossing out of the east side line of the claim, and that it was a continuous and identical vein.

The views of the two parties may be succinctly stated as follows:

The appellant maintained that the Black Tail vein at the surface extended northerly from the Black Tail claim into the Lone Pine claim and that it there bent and changed its course from a northwesterly course to a northeasterly course. The plaintiff's witnesses, mining engineers and practical miners, testified that the vein and quartz of the vein could be followed continuously from the point where the Black Tail vein was admitted to extend around the bend in the vein and across the east side line.

The appellee, on the other hand, contended that there were two veins, one the so-called No. 2 vein, which it claimed crossed the opposite side lines of the claim, and the other, the Black Tail vein, which it claimed extended in a general northerly and southerly direction. There was no development of the so-called No. 2 vein to or across the west side line of the Lone Pine claim. There was no development of the Black Tail vein north of the so-called No. 2 vein. The witnesses

for the defendant, with varying degrees of qualification suggested the hypothesis that there had been originally two veins, but that a large fault movement separated each into two parts; that a relatively small exposure of quartz near the southwest corner of the Lone Pine claim had originally been connected with the so-called No. 2 vein.

The question calls for some analysis of the testimony.

Before referring thereto, let it be again stated that it was admitted by the witnesses for the appellant that the Black Tail vein extended as far north as Station 552 on plaintiff's Exhibit No. 1, which is the same as Station 558 on defendant's Exhibit No. 26. From that point, the witnesses for the plaintiff testified that they followed continuous quartz and vein around the bend and thence through continuous openings and exposures to the east side line of the Lone Pine claim. It was claimed that in the northerly end of the trench at Station 552 was the Lone Pine No. 2 vein, but at least one of the witnesses for the defendant, Mr. Wiley, was forced to admit that there was continuous quartz in the trench extending northerly from Station 552.

Mr. Searls described the tracing of this vein and we may be permitted to quote from his testimony as follows:

"Returning to the Black Tail vein, which is the one with which we are concerned, I would reiterate that that is traceable with absolute continuity, from the Black Tail through the Lone Pine into the Fraction claims, with the exceptions which I will now enumerate. There are a few small transverse postmineral faults which interrupt the continuity of the vein, but all of these are visible

mainly on the surface. Near the stope at a point not far from the discovery of the Black Tail claim, and are shown on this map by two blue lines, one through point 40-C and the other just south of the open stope. These are interruptions to the vein. They displace it at a distance of twenty-five or thirty feet. But they are a very common feature to veins. There is, I believe, no doubt whatever that the segments on the two sides are the same vein, simply separated by this post mineral movement. North of the fault at 40-C the vein is clearly traceable on the surface continuously for a distance of 400 feet, having throughout that a distance width of from four to eight feet of solid quartz and additional stringers. It is a good strong vein cropping continuously through that distance. Just northerly of the point marked T-875, where a small shaft or pit has been sunk a few feet on these croppings, the croppings run under an area of glacial drift. For a distance of perhaps one hundred fifty feet along the strike of the vein, and to the west down toward the corner of Lone Pine claim the ground is cumbered to a thickness of as much as fifteen feet with gravel, boulders and sand which do not permit anything to be seen of the features which are in the bed rock. So that we have in that interval from a point 14 feet northerly from T-875 to the end line of the Lone Pine claim a gap of approximately 90 feet where there is no continuous exposure of that vein, and yet it is exposed again farther on, and the continuity which it exhibits in that direction is such that I believe there can be no reasonable doubt that it is persistent through that gap of ninety feet. At the end line of the Lone Pine a trench has been dug through this glacial drift which covers the surface of the ground, and in the bottom of that trench there was formerly exposed two streaks of quartz belonging to the Black Tail vein, one of which was about ten inches thick and the other somewhat narrower. I might say that these exposures are not so good now, due to the fact that that trench was dug

some time ago and has caved in to some extent, walled up, high walls in the glacial drift. From there for a distance of forty or fifty feet northerly the trench shown on the map does not go down to bed rock. It is right in the wash, although it is 5 or 6 feet deep. But when it does reach the bed rock again near Station T-843 it again exposes the Black Tail vein which is there 4 feet thick of solid banded quartz. From there down to 537 and for a distance of 20 feet—a distance of 15 feet northerly of it, there is a continuous exposure of the Black Tail vein at its apex in the trench. Throughout that distance it is a solid vein varying in width from $2\frac{1}{2}$ to 4 feet. A few feet northerly of Station 537 this trench, coming down the slope, comes to the gulch which is clearly indicated running across the southerly end of the Pine claim by the contours which run around it. Here again we have a short distance where the sand and gravel and boulders carry down in that gulch by the water have obscured the outcrop of the vein, covered it over, so that it is not traceable at the surface, and there is in fact a length there of 42 feet in which no quartz can be seen, because it is covered over with gravel that has been washed out by the stream.

A. (Continuing). From that point the quartz is plainly visible on the northerly side of the ravine, and which there has a strike of north 52 degrees west pointing exactly over to the exposure in the northerly end of a trench facing it south of the gulch and forty-two feet away. The vein can be continuously traced without any break whatever except that there is a bush growing over the outcrop, making it for a distance of about eight feet south of Station 552 invisible. Up the hill across contours 2860, 2900 and 2920 continuously along that trench through the vicinity of Station 554, throughout that distance there is a small vein of quartz continuously exposed in that trench. Near Station 554 the quartz no longer exists. The main part of the vein no longer exists at the

outcrop because it has been stoped out-mining operations have taken out the vein through the area marked "Open stope" and have removed the greater portion of the vein which is absolutely continuous from there across to the side line of the Lone Pine claim. In fact the red area between trench 897 and Station 545 and this Station 546 are only pillars left at the surface to help keep the stope from caving in. That distance from near Station 554 to the side line of the Lone Pine claim represents the outcrop of the ore shoot and that ore shoot has been stoped throughout that distance so that where except for the pillars, the vein no longer exists in the ground the existence of the stopes shows that that vein was absolutely continuous throughout that distance." (R. pp. 64-68).

Mr. Jerome J. Day, president of the plaintiff company, a successful and practical miner, a man who has actually developed several large mines, testified that upon acquiring the Lone Pine mining claim, crosscuts were driven by him, one on the 300 foot level from Station 190 to Station 191, and the 400 foot level driven out in a southwesterly direction as a crosscut. In neither of these workings did they find any vein.

It is evident by an examination of the maps that had the Black Tail vein extended northerly or the Lone Pine No. 2 vein, so-called, extended westerly to the west side line of the claim both of these workings would have developed that fact.

In neither crosscut was any vein found and Mr. Day, looking to the practical development of his mining claim, thereupon gave directions to go upon the surface and trace the vein there, first by sinking pits, and then by extending trenches between the pits. These surface workings started near what was then an open stope at Station 544 and the vein was traced

upon the surface around the bend, (R. pp. 152 to 157). He said that this surface work was done for the purpose of assisting him in finding the vein underground by first finding out where the apex was (R. p. 154). On page 155, he explained the reason why the vein was not developed on the surface across the gulch. Mr. Day testified that he had followed the vein continuously upon quartz and vein matter around the bend in the vein to the trench marked upon the map "G-1" (the small trench south of Station 552). He testifies that there is a continuous working and physical connection to the workings in the Last Chance (R. p. 156). Mr. Day testifies that the bending of the banded quartz with the vein is very noticeable around the bend and that where it is last observed at the trench G-1, the vein and the banding of it has a southerly direction. (R. p. 157).

The trenching for the purpose of showing the apex of this vein was not done for litigation purposes, but was done solely for development purposes prior to any controversies (R. p. 158).

Mr. W. L. Herrick, a practical miner, familiar with the Republic camp, testified to the identity and continuity of the vein as claimed by the plaintiff. He particularly called attention to the fact that not only the vein at the surface but the actual ore body as stoped showed the bending of the vein. On page 222, he testified as follows with reference to the vein around the bend:

"Why, the vein has heavy bends. I took a course in that open stope—I managed to get up in a hole in the 200

level—kind of a dangerous looking stope—and the course going easterly was about north 50 degrees east and then as you go near the southwesterly end of the stope it changes to about north 30 degrees east. Then as you get right to the end of the open stope and start to go down the cut, it gets very nearly north—I think about north 10 degrees; then as you go lower from there it is just about due north.”

Mr. Searls explains the manner in which the compression fissures were formed which ultimately became mineralized and his testimony shows that the bending of the vein is exactly what would be expected in a rock fissured as that was and in the manner in which it was. (R. p. 57-59).

The testimony of Mr. Roy Wethered and Mr. J. C. Ralston, mining engineers, is to the same effect.

Mr. William A. Simpkins testified that he had followed the Black Tail vein to the cut or trench just south of Station 552 “where it is continuously observed around a bend, where the bending of the quartz is plainly observable to the open stopes, and thence northeasterly to the side line of the Lone Pine claim.” (R. p. 254). Describing the vein, he says:

“The characteristic feature of this vein is its crooked strike and the number of branches which it has. These run in various directions from the foot and hanging wall, and are usually much larger where they leave the vein than at a little distance. Most of them die out in a short distance or at least disappear under the wash. These branches are both in the foot and the hanging.” (R. p. 254).

On page 256, he describes the branchings from the main

vein. He describes how the vein widens and narrows (R. p. 258). Describing the vein around the bend, he introduced some photographs. His testimony was as follows:

“The vein is continuous. It is banded in most cases, and where banded the bending of the ribbon quartz is plainly observable. The footwall is exposed in some places, and in some places the hanging wall. There are few places where both walls are not exposed, but where they are exposed, there is a very distinct bending of the walls around those turns. I have some photographs of some of those places.

Q. Let us have them marked. We will have them marked Plaintiff's Exhibits 19, 20, 21 and 22. As you speak of the photograph, give its number.

A. Referring to No. 19, I will state that this photograph was taken at Station 552, looking in a northeasterly direction, and shows the footwall of the vein bending around the turn. I might state that this is the sharpest turn noted in that vein.

Q. Will you put some marks showing that bending of the footwall?

A. I will mark 'A' on the left-hand side, 'A' at the center, and 'A' in the lower right-hand corner indicating the footwall of the vein.

At this point the banding is not so evident as in some other parts, but the quartz is plainly depicted and photographed and the footwall. The relative size of the quartz body can be seen in the photograph.

Referring to Photograph No. 20, I will state that this was taken at Station—

Q. You said No. 19 was taken at No. 552.

A. I will have to correct that. It was taken at the

top of the trench where the letter 'T' occurs in the word 'trench' on Plaintiff's Exhibit No. 1.

Q. Just mark 19 there.

A. Looking in a northeasterly direction, and that is the sharpest bend in the vein.

Photograph No. 20 was taken at Station No. 552, looking in a northeasterly direction and shows the vein with the banded quartz. The relative size can be seen by referring to the pick. To illustrate the bending of the vein in the stope which is marked 'open stope' near Station 544 on Plaintiff's Exhibit No. 1, I tried to get a picture looking in a northeasterly direction, but was unable to see a portion of the stope, standing at that point, because there is such a distinct bending that it is impossible to see the easterly end of the stope. So I took the picture from the easterly end, looking down in a southwesterly direction. It is not a very good photograph because the sun was shining and it was taken almost at the sun." (R. pp. 262-263).

Upon the surface, as we have pointed out, Mr. Wiley admitted that through the trench north of Station 552 there was continuous quartz (R. p. 494). The testimony of plaintiff's witnesses is that it was continuous around that bend. One statement from the testimony of Mr. Searls to which we direct attention found at page 81 is as follows:

"The miner certainly considers it as one vein, because the quartz is the thing that he follows. The geologist might have different ideas as to the genesis of it, but I think the continuity of the quartz and the quartz structure is the thing that determines the identity and continuity of the veins, rather than a change in direction."

But a short distance beneath the surface the same proof was

presented. A working called the "Sand Winze" is shown upon various of the exhibits and particularly upon plaintiff's exhibit No. 4. It is admitted by the witnesses for the defendant that the Black Tail vein is disclosed there. Mr. Wiley says it may be the Black Tail and very possibly is. (R. p. 487). Mr. Lakes, one of the geologists for the appellee, says on page 386, with reference to the Sand Winze, that the Black Tail vein is right there; and the exhibits of the defendant have it so marked.

A little distance away a working was driven southerly from Station 331. It is referred to in the testimony as working 331 $\frac{1}{2}$. Mr. Searls presented a map on a scale of ten feet to the inch, Plaintiff's Exhibit No. 4, which we reproduce here:

This map shows the workings in this vicinity.

As above stated, it was admitted by the witnesses for the appellee that the vein shown in the Sand Winze is the Black Tail vein, but they claim that the vein extending in the working from Station 330 to 331 and thence southerly is not the Black Tail vein, but is the No. 2 Pine vein.

The Sand Winze and the workings southerly from Station 331 are not quite on the same level. In the face of the last mentioned working, the strike and dip of the quartz agrees with the strike and dip of the quartz in the Sand Winze; is not over 15 feet away, and is parallel and similar to it in all respects (Searls, R. pp. 81. to 91). Indeed, Mr. Wiley, one of the defendant's witnesses, was forced to admit that projecting the vein showing in the Sand Winze up to the level of the working south from Station 331, it would actually connect

NORTH

N 10650

N 10550

N 10450

E 10000

E 10100

E 10200

A DETAILED SKETCH
PORTION OF

PINE No 2 TUNNEL

Scale 1 inch = 30 Feet.

PLAINTIFF'S
EXHIBIT

4



with it and if a raise were put up there, it would actually connect at the end of the drift or near to it (R. p. 487).

Mr. Simpkins says the greatest distance in that area where the vein is not actually opened up continuously is 18 feet and that there is no question about the continuity of the vein from the Sand Winze through there beyond Station 331 (R. p. 260). On page 266, he says the quartz can be continuously followed through that working with the exception of for five or six inches.

With reference to the bending in the vein, Mr. Simpkins (R. p. 267) calls attention to the fact that the bending in the vein is not unlike the bending in various other mines, the names of which he gives.

We have here then the direct, the specific, the certain testimony of witnesses, mining engineers of high reputation and practical miners, that the vein and the quartz of the vein is continuous around the bend from the south end of the trench near Station 552 to which point appellee's witnesses admit the Black Tail vein extends.

Diligent efforts were made by the mining engineers employed by the defendant to develop something across the west side line of the Lone Pine claim which they might connect up with what they called their No. 2 vein. In doing so they developed in a series of trenches a quartz vein, which as it is followed westerly dies out as it reaches a railroad cut just beyond the side line. They were unable to connect it with the vein called by them the No. 2. In order to match this up with the so-called Lone Pine No. 2 vein, it was essential that there

be a displacement on the level of more than 100 feet. It also seemed necessary to any such theory that the other segment of the Black Tail vein to the north should be found.

The witnesses for the defendant testified that in a small working near Station 64-C on their Exhibit 28 was disclosed a quartz vein or veinlet having a general northerly and southerly direction. This quartz showing was never worked upon except to be followed a few feet where it pinches out. Practically no work was done upon that small showing but the engineers for the defendant projected it several hundred feet to where they found a small stringer crossing the Pearl tunnel just west of Station 91-C. No witness for the defendant testified that the exposure near Station 64-C nor the exposure in the Pearl tunnel was the extension of the Black Tail vein. Suggestion was made that those exposures might be. An examination of the testimony will show that it was a mere expression of opinion that the theory was possible.

A brief analysis of the testimony upon this subject will show that the position of the defendant was unsound. In the first place, veins have three dimensions, length as well as thickness, and extension downward. The vein called by the defendant's witnesses the No. 2 vein, drifted on for 1000 feet and developed at the present time to a depth of 600 feet, is represented beyond the ore shoot and the hypothetical fault which they say may have displaced it, by a small quartz showing less than 100 feet in length and ending in the railroad cut. This quartz was disclosed in the railroad cut for many years

without anyone thinking enough of it to even dig a trench upon it until this litigation arose.

The Black Tail vein southerly of the socalled fault, opened for over 1000 feet, with hundreds of feet of workings upon it, they would have the court believe to be represented northerly of their hypothetical fault by the little branch vein in No. 2 tunnel at Station 64-C. Drifted on for 20 feet, that veinlet pinched down to one foot of quartz that the miners considered unworthy of following and a winze 18 feet deep apparently produced the same result.

It is true the defendant contends the same vein is found in the Pearl 300 feet away, but this is pure speculation which cannot stand in the face of the fact that it is not exposed on the bare hillside 40 feet above the No. 2 tunnel. Although defendants admit that it must cross the No. 3 level crosscut, the miners who drove that crosscut did not recognize that they had cut any such vein. They did not shoot a single round on any such vein and in the No. 4 level crosscut, even defendant's witnesses find nothing that they can describe as such a vein. Mr. Day, by whom these workings were driven, testified they developed no vein. So they would represent the Black Tail vein, which is known for over 1000 feet southerly of the alleged fault, by this little branch stringer whose known length is 20 feet, pinching to almost nothing, and the socalled Lone Pine No. 2 vein north of the fault becomes the litigation vein in the trenches near the southwest corner of the claim petering out within a relatively few feet.

This asserted correlation was the only evidence of any such

fault. To support its theory, defendant's witnesses had to assert, in order to match up the claimed segments of the Black Tail vein, the existence of a fault of which the horizontal component is variously estimated to be from 20 to 80 feet and they say this fault moved nearly parallel with its dip so that the actual movement must be very much greater, the vein itself dipping from the horizontal.

They seek to explain the non-appearance of gouge which is supposed to mark this fault in the No. 1 or Pearl tunnel, or across the vein which was developed at the discovery post, by saying the fault has branched.

Assuming such to be true, what has become of the movement? A fault is not to be thought of only as clearly marked by a few inches of gouge. It is a surface along which there has been a differential movement of the earth's crust, one block sliding on the other; in this instance, according to the defendant's witnesses, more than 100 feet vertically. It is admitted that the vein which was developed at the point where the discovery notice was placed was not disturbed by this fault. How could such a movement take place and yet not disturb the ground 200 or 300 feet away? The fault is also not shown in the Pearl tunnel. It was admitted that it does not displace the Surprise vein. Mr. Searls testifies that the 18-foot fault found in the Black Tail stopes in the Black Tail mine extends clear across to the Surprise vein and faults it a similar distance. Mr. Burch, on cross examination, testified that the so-called discovery vein had been faulted two feet by another fault which he projected 100 feet upward and 280 feet hori-

zonally through undeveloped territory, (R. pp. 320-321).

So that in these premises the only fault which seems to suffer an early death from dissipation is the largest one that any one has found in the Republic district.

Observed facts should have greater weight than opinions and theories even of the most experienced and best of mining engineers. Judge Lindley in his treatise on the

Law of Mines, Sec. 615, P. 1473

says:

“Identity may, of course, be proved by continuous development, although this is not always practicable, nor is it necessary. It may be deduced from observed facts in different portions of the mine. At the same time it is to be understood, in the absence of continuous development and exposure, the correlated facts exposed should logically lead to a conclusion of identity. Mere conjecture or intelligent guess would not be sufficient. The incessant features of a given vein as exposed in underground works may ordinarily be presumed to continue throughout undeveloped sections, within reasonable limits, unless there is something in the exposed conditions which negatives such presumption.

The data, however, upon which the presumption is predicated must, of course, be physical facts shown to exist at the different points, which are to be correlated. The existence of such facts must be something more than a matter of mere conjecture. Basic data cannot be inferred.”

On page 1475 there is presented an attempted correlation where it was held that the basic data was inference.

In the case at bar the learned gentlemen who appeared for

the defendant inferred their basic data upon which they predicated their opinions with reference to the fault testified to by them. For instance, Mr. Wiley's testimony in that respect is as follows:

“THE COURT: What was the extent of that fault?

A. You mean the amount of the displacement?

THE COURT: Yes, sir.

A. I really don't know. For me it is rather a difficult thing to determine, but to approximate it, *if we assume a movement of about 100 feet, as a thrust fault*, that is, a reverse fault, the hanging wall moving up instead of down, as it sometimes does, it would explain the position of these veins.

THE COURT: What is the extent of it in other directions?

A. The horizontal displacement varies greatly on different levels. The best illustration, perhaps, of that, would be on the map where we have the vein on the surface in Pine No. 2, the extension to the southwest, and making this band along the fault, so that the horizontal displacement, if you measured at right angles to the vein, over to a point opposite *where this extension would be, if extended*, would measure 50 or 60 feet, but if you take the distance between the last occurrence of quartz, *it might be nothing and would be very much less than that.*” (R. p. 482-3).

Can it be that on such speculative conjecture there can be a finding that there was any such fault as assumed by defendant's witnesses in the face of the direct, the positive and the certain testimony of continuous vein and continuous quartz around the bend.

Mr. Wiley distinctly does not testify that the disclosure at

64-C is the faulted segment of the Black Tail vein (R. p. 485). That Mr. Wiley did not care to squarely place himself on record as in favor of any such theory can be easily determined by examining his testimony (R. pp. 487-489). He admitted on page 500 that this fault which he had been talking of did not displace or fault the so-called Discovery vein. He says that it has terminated before reaching that vein. In other words, Mr. Wiley assumes that the small showing of vein at Station 64-C is a faulted segment of the Black Tail, and then assuming a fault with a movement of 100 feet as a thrust fault he says it would explain the position of the veins.

Mr. Burch approaches the subject from another angle. He assumes a fault with a 120 foot vertical throw and therefore concludes that the exposure at 64-C is a part of the Black Tail vein. His testimony in that respect will be found at pages 321-322. He says that his theory is the only one which seems to fit, (R. p. 322).

It is absolutely impossible from the reading of that testimony to ascertain how he could figure any such fault except by first assuming that the small exposure at 64-C was a severed portion of the Black Tail vein.

Mr. Lakes' testimony with reference to his method of figuring out the fault is found at pages 373-375, where he says he secured his figures by taking the strike of the vein as shown in the southwestern part of the No. 2 level and what he called the "continuation" at 64-C and in that way measured the displacement.

If the court will undertake to follow Mr. Lakes' testi-

mony with reference to this mythical fault (R. pp. 382 to 387), it will be seen that the mining engineer himself is simply guessing.

So that the court cannot find that there is any such fault unless it is first found that the vein exposed in the working 64-C is a severed or faulted portion of the Black Tail vein. The entire fault theory is based upon the inferring of this basic data.

It is incumbent upon the defendant in presenting its theory not to rest alone on the claim that there was a fault, but to show that what they call the Lone Pine No. 2 vein and the Black Tail vein mutually intersect and cross each other. There is no testimony except the inference and guess of the mining engineers to the effect that they do. Not a single witness testified to a single exposure where he saw the veins crossing. The whole theory of crossing depends on a magnification of the little stringer in the drift and winze at Station 64-C to the importance of a segment of the Black Tail vein; on the magnification of the vein in defendant's cuts near the southwest corner, dying out in the railroad cut to the importance of a segment of the so-called No. 2 vein and then to assume a 100 foot fault which does not cut anything else, to bring these exposures opposite each other.

How much more reasonable it is to suppose that the unimportant stringer of quartz followed for a short distance in the drift and winze at 64-C is one of the branches of the vein, a number of which were described by Mr. Simpkins in his testimony, and testified to by Mr. Searls (R. p. 511), and that the

exposure near the southwest corner is simply a filling with quartz of one of the small northeast conjugate fissures, as Mr. Searls says many of them were, by the same great stress which formed the main vein.

It is true according to the witnesses for the defendant that these northeast-southwest fissures were very numerous. How therefore can it be correlated to the one and not to another of the many such? It is pure assumption. It is perfectly evident that this little vein in the southwest corner of the Lone Pine does not extend to the Surprise. Why, therefore, are we called upon to presume or infer that it will extend to the Black Tail, or as our friends on the other side called it, the Lone Pine No. 2?

Defendant seeks to explain the turn in the croppings of the Black Tail vein by attributing it to migration on the hill side. This elementary consideration is apparent to the court and the witnesses for the plaintiff conceded that some of the apparent bending was attributable to migration, but the cropping of a crooked vein migrates as well as that of a straight one, and in this instance it is admitted that there is a bending in the vein itself. Both on the surface and on the 200 level, the vein turns nearly half way around, that is to say, from an east-west strike to a north-south strike within the area where it is conceded by the defendant to still represent the Lone Pine No. 2 vein in place. Is it not just as likely that this bend which has been initiated will continue and that the vein will turn around to the southeast strike as easily as to turn back

again to the southwest strike which it has, going toward the east side line?

True defendant asserts that the bend in this vein is caused by drag on their hypothetical fault, and yet their own maps and testimony show that the fault makes the same turn as the vein bending more than 30° in strike. As Mr. Searls testified, it is evidence of the fact that the course of the vein controlled the course of the movement along this post mineral fault rather than that the fault dragged the vein.

A convincing argument against the theory of the defendant with reference to this alleged fault with the great movement attributed to it, is the condition shown in the No. 2 tunnel level where the quartz on two sides of the fault as it is pictured on defendant's exhibits is solid and in place. No witness denied such fact. It is inconceivable that a great earth movement such as that described by the witnesses for the defendant could have taken place along the plane of that fault through that solid quartz and have left it undisturbed and unbroken. While migration might give an apparent bend to the vein on the surface because of the contour of the ground, it cannot affect the trace of the vein on the level, and on the 200 foot level this vein, as admitted, shows a bending as claimed by the plaintiff.

On the No. 2 level, of which either the roof or the floor constitutes a level plane, the solid, unbroken quartz vein is testified to by Mr. Searls as exhibited upon plaintiff's 10 foot detailed map, Exhibit 4, copy of which has been inserted in this brief, to turn around gradually from a course of North

30° East through North and South to a course of South 28° East in the face of the working southerly of Station 331.

While there is some conflict in the testimony as to the exposure at this point, it is perfectly evident that the quartz in the end of the working is not parallel with the working, but cuts diagonally through it and has turned around to a course exactly parallel to the Black Tail vein farther south and to a course which by a projection not to exceed 15 feet will connect it up with the exposure in the Sand winze and in the workings at the collar of the main winze, concededly the Black Tail vein.

So that on this 200 level, with the question of migration eliminated, we have the turn of the vein, continuously developed, and an examination of the record shows that all of the witnesses for the defendant testified that the quartz in the face of that working south of Station 331 was the quartz of what they called the Lone Pine No. 2 vein. Mr. Wiley admits that the quartz of the Black Tail vein as shown in the Sand winze would upon its upward course connect with that showing on the No. 2 level. It is only 15 feet away.

The continuity of the vein is not determined by the continuity of the ore shoot or of commercial ore. The main ore shoot ends, in a general way, near the vicinity of the bend in the vein. In the upper levels and at the surface it enters the bend, that is to say, the open stopes participate in the bend. As Mr. Herrick testified he took courses in the open stopes showing the turning and bending of the vein itself from a course of North 50° East around to a course of nearly north

and south (R. p. 222). In the lower levels, the stopes do not extend up to the bend.

Some of the witnesses for the defendant sought to take advantage of the change in the character of the vein beyond the ore shoot to further their contention that it was faulted. They undertook to contrast the size of the vein where stoped with what is admitted to be the Black Tail vein at Station 558; to point out that on the lower levels the drifts were not continuous around the bend. The court will understand and appreciate the fallacy of their position. If the ore shoot extended in undiminished size and tenor around to the end line, there would be no controversy over the question. The miners would have followed the vein around in the drifts and stopes, but the ore shoots end where the stopes end. This is just as true under the contention of the defendant as under the view of the plaintiff.

There is no evidence to show that the vein ends where the stope ends; both parties claim it continues beyond. It either continues around the bend and across the end line where it again swells out to make a second ore shoot in the Black Tail claim some distance away, as asserted by plaintiff's witnesses, or it stops part way around the bend diminished in size and is there faulted 100 feet or so. Under either contention, the vein is admittedly smaller and weaker in the southern portion of the Lone Pine claim, and the contrast in width, the narrowing or pinching of the ore shoot is operative under either theory and is no argument against it.

But this change in the width of a vein is not unusual. Mr.

Wiley (R. p. 496) admitted that a vein as wide as fifty-five feet might pinch down to an inch, and when his attention was called to the Argonaut-Kennedy vein, he remembered being a witness in litigation involving that vein and having traced it from a width of fifty-five feet down to less than an inch.

Judge Bourquin in

Clark-Montana Realty Co. v. Butte & Superior Copper Co., *supra*, p. 560

in describing the Rainbow, one of the great lodes of Butte, says:

"At places in these premises it is 200 or more feet in width and largely commercial ore, while at others it narrows to a few feet, if not to a mere fissure, so far as ore is concerned."

With reference to the gouge which is found along the drift near Station 331, Mr. Searls in rebuttal testified that that gouge itself bends around and follows the bend in the vein, and shows that the turn in the vein is not referable to the drag in the fault because the fault itself turns. In other words, the fault is simply a postmineral fault following along the vein (R. p. 505). Mr. Searls testified that he has examined the No. 1 tunnel; that if any such fault as that described with a 100 foot displacement existed he would have seen it and that there was no such fault in either working. He also says that no fault with such displacement could die out so rapidly as to displace the Black Tail vein or the so-called No. 4 vein 100 feet and not displace the so-called Discovery vein (R. p. 507). Mr. Searls testified that the small quartz exposure

at 64-C represented a little branch of the Black Tail vein similar to other branches (R. p. 511).

Before closing this discussion, we again direct attention to the surface and to the fact that the witnesses for the plaintiff made a critical examination of the ground foot by foot and reported to the court that the vein and the quartz of the vein could be continuously traced according to their observations from the trench G-1 northerly by Station 552 and around the bend in the vein.

This testimony is testimony of observed facts and should have greater weight than the opinions and theories of even the best of mining engineers, who for their premise must infer the basic data. This is precisely the difference between the case of the plaintiff and the case of the defendant.

With respect to the observations of the witnesses on behalf of the defendant in their examination of the surface, it may be fairly said that they did not agree, and that at least one of them was not entirely clear with respect to what is shown in the important trench north of Station 558. Mr. Lakes, for appellee, testified that there was a break in the quartz in that trench, and on page 389 he testified as follows:

“Q. How many feet is there in there that he cannot follow quartz?

A. Between 8 and 10 feet.

Q. Between 8 and 10 feet within that tunnel 558, you say you cannot follow quartz?

A. Cannot follow quartz with the strike of either one

of the approximate—approximate with either one of these veins.

Q. Let's leave that out. Isn't it true that he can follow quartz? Now, we will leave out the strike and dip and so forth—follow continuous quartz in that trench from its face to its mouth.

A. I couldn't.

Q. You couldn't?

A. No, sir.

Q. And there is a difference of ten feet in which you say there is no quartz?

A. Approximately 10 feet.

Q. Approximately 10 feet there?

A. Yes."

Mr. Burch, for appellee, testified (R. p. 324) as follows:

"Q. As a matter of fact, you were unable to trace continuous quartz through that trench down to its southern end?

A. Yes, sir, I could not; not unbroken."

Mr. Wiley did admit that there was an interval where there was much less quartz than at the north end of the trench, but he did admit that there was continuous quartz down the trench (R. p. 494).

In view of this somewhat contradictory testimony on the part of the defendant's witnesses and the apparent uncertainty with which at least two of them described it, it would certainly seem that the weight of the evidence upon this issue is with the plaintiff.

The entire theory of appellee's witnesses may be thus summarized:

Assuming a great fault with a displacement on the level of 100 feet, and an unknown vertical and longitudinal displacement, the vein at the southwest corner of the claim originally was a part of the so-called Lone Pine No. 2, and the branch at 64-C could be the faulted segment of the Black Tail; or

Assuming the vein at the southwest corner of the claim to be a faulted segment of the so-called Lone Pine No. 2 vein and the small quartz stringer at 64-C to be the faulted segment of the Black Tail, then there was such a fault.

In either case, the basic data must be assumed or inferred.

A little postmineral movement along the vein is magnified to a great fault, with a displacement of 100 feet, but it does not displace the so-called discovery vein.

III.

THE RELATION OF THE EXTRALATERAL RIGHT OF THE LONE PINE CLAIM TO THE STRIKE AND DIP OF THE BLACK TAIL VEIN.

Mr. Searls covered this question in his testimony and with plaintiff's Exhibit 3. He describes it in the following language:

"There is shown on this map plaintiff's Exhibit 3, the number 2 or 200 ft. level of the Pine mine and there is also shown a black line marked average course of the Black Tail vein in the Lone Pine claim, which is a line joining the exposures of the vein on this level where

it crosses the east side line and where it crosses the south end line of the Lone Pine mine. There is also shown through one extremity of that line a line parallel to the end line of the Lone Pine claim and marked here 'Direction of extralateral right.' The line marked 'Average course of the Black Tail vein in Lone Pine claim' represents the average course because the vein being curved has many local strikes. Observations for strike taken at various points on the curve of the vein would give different results and the only result that can be had for its average course is a line showing the extremities of the exposure on the same horizontal plane within the claim.

That being then the average course or strike of the vein within the Lone Pine claim, a line drawn at right angles to it is the dip or direction of dip. The angle between the dip and the end line or direction of extralateral rights of the Lone Pine claim is 23 degrees.

There is also shown on this map, Plaintiff's Exhibit 3, the 500 level of the Last Chance and the 600 level; the 500 level being the longest level driven within the Last Chance claim. There is shown immediately above that level a line marked 'Average Course of Black Tail Vein in the Last Chance Claim,' which is a line parallel with the exposure of that vein continuously from one end of that drift to the other. That drift represents as nearly as we may know the average strike of the vein within the Last Chance claim and the line at right angles to it represents the dip. The direction of the end line or the direction of extralateral right makes an angle with that direction of 37 degrees.

Q. So that whether you take the course of the vein in the Lone Pine claim or the course of the vein in the Last Chance claim between the planes of the end line and one parallel thereto on the Pine claim, you are following more upon its downward than upon its onward course.

A. That is true; the direction of the extralateral

right is more nearly on the dip of the vein than on its strike." (R. pp. 75-76).

This testimony stands undisputed. In the first place, no one denied that the course of the vein within the claim is determined in the manner stated by Mr. Searls. It is not a local course, but the general course which is taken.

Whether the course is taken of the vein within the Last Chance claim or the vein within the Lone Pine claim, the result is the same and the extralateral rights sought are more in the direction of the dip than in the direction of the strike and the question, therefore, should be decided as a question of fact, namely, that the extralateral rights sought to be exercised are more upon the dip than upon the strike.

In this case the question involved is as to the apex within the Lone Pine claim and it is the course of the vein in that claim that affects the extralateral rights.

Counsel for appellee in the court below suggested that it was the local course at the precise point where it passed out of the east side line which controlled. But that manifestly could not be true. It is the course of the entire vein within the claim.

It has been held in this circuit that it is immaterial if the extralateral right be more upon the strike than upon the dip.

Last Chance, etc., M. Co. v. Bunker Hill & S. M. & C. Co., 131 Fed. 579

Empire State-Idaho M. & D. Co. v. Bunker Hill & S.
M. & C. Co., 131 Fed. 591.

Lindley on Mines, Sec. 319.

The action was instituted to quiet title to the Lone Pine claim and as to what was properly included within that claim. If the situs of the apex is as claimed by the plaintiff, the outside parts of the vein between a vertical plane drawn downward through the south end line of the Lone Pine claim and a vertical plane parallel thereto 589 feet northerly (that is, at the point of departure through the west end line) are just as much a part of the Lone Pine claim as if they were entirely within its surface lines.

Tyler M. Co. v. Last Chance M. Co., 90 Fed 15-21

Empire State-Idaho M. & D. Co. v. Bunker Hill & S.
M. & C. Co., 121 Fed. 973.

BURDEN OF PROOF.

The continuity and identity of the vein is admitted from the Last Chance working to the southerly end of the open stope and into the trench north of Station 558, and the Black Tail vein is conceded to have extended as far northerly as the southern end of said trench at Station 558. Mr. Wiley admitted continuous quartz through the length of that trench.

Underground, the Black Tail vein was admitted as far north as the Sand winze. The witnesses on the other side testified that the so-called Lone Pine No. 2 vein extended to the face of the drift southerly from Station 331, not over 10 or 15 feet away from the Sand winze. All of the witnesses for the appellant testified, and Mr. Wiley, for the appellee, was forced to admit that the projection of that vein upward from

the Sand winze would show a connection with the vein in the working South of 331.

All that is necessary in meeting that burden of proof was to show the continuity of the vein around the bend and that has been done by a great preponderance of the evidence.

Respectfully submitted,

JOHN P. GRAY,

JOHN H. WOURMS,

Attorneys for Appellant.

No. 3691

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHPORT SMELTING & REFINING COMPANY
(a corporation),

Appellant,

VS.

LONE PINE-SURPRISE CONSOLIDATED MINES
COMPANY (a corporation),

Appellee.

} IN EQUITY

On Appeal From the United States District Court for the Eastern
District of Washington, Northern Division.

BRIEF FOR APPELLEE.

WM. E. COLBY,

San Francisco, California,

FRED S. DUGGAN,

Spokane, Washington,

Attorneys for Appellee.

FILED
OCT 17 1911
T. D. BOWEN, CLERK



No. 3691

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHPORT SMELTING & REFINING COMPANY
(a corporation),

Appellant,

VS.

LONE PINE-SURPRISE CONSOLIDATED MINES
COMPANY (a corporation),

Appellee.

} IN EQUITY

On Appeal from the United States District Court for the Eastern
District of Washington, Northern Division.

BRIEF FOR APPELLEE.

Statement of the Case.

This is a suit to quiet title to an underground segment of vein based upon an alleged extra-lateral right asserted by virtue of the ownership of the Lone Pine lode mining claim owned by appellant. The appellee is the owner of the adjoining Last Chance lode mining claim, vertically beneath the surface of which is found the segment of vein in controversy. The plat here inserted will illustrate

the relation between these claims and the position of the vein in controversy.

This map is a composite of defendant's (appellant's) Exhibits Nos. 26 and 27. The position of the apex of the Lone Pine No. 2 vein, which is the vein here in controversy, is shown on this plat colored in red, as is also the position of the apex of the discovery vein of the Lone Pine claim. It will be noted that these veins extend across the Lone Pine claim in a northeasterly and southwesterly direction, whereas the Black Tail vein apex, colored in orange, and also the Surprise vein apex, which is substantially parallel to the Black Tail, extend northwesterly and southeasterly.

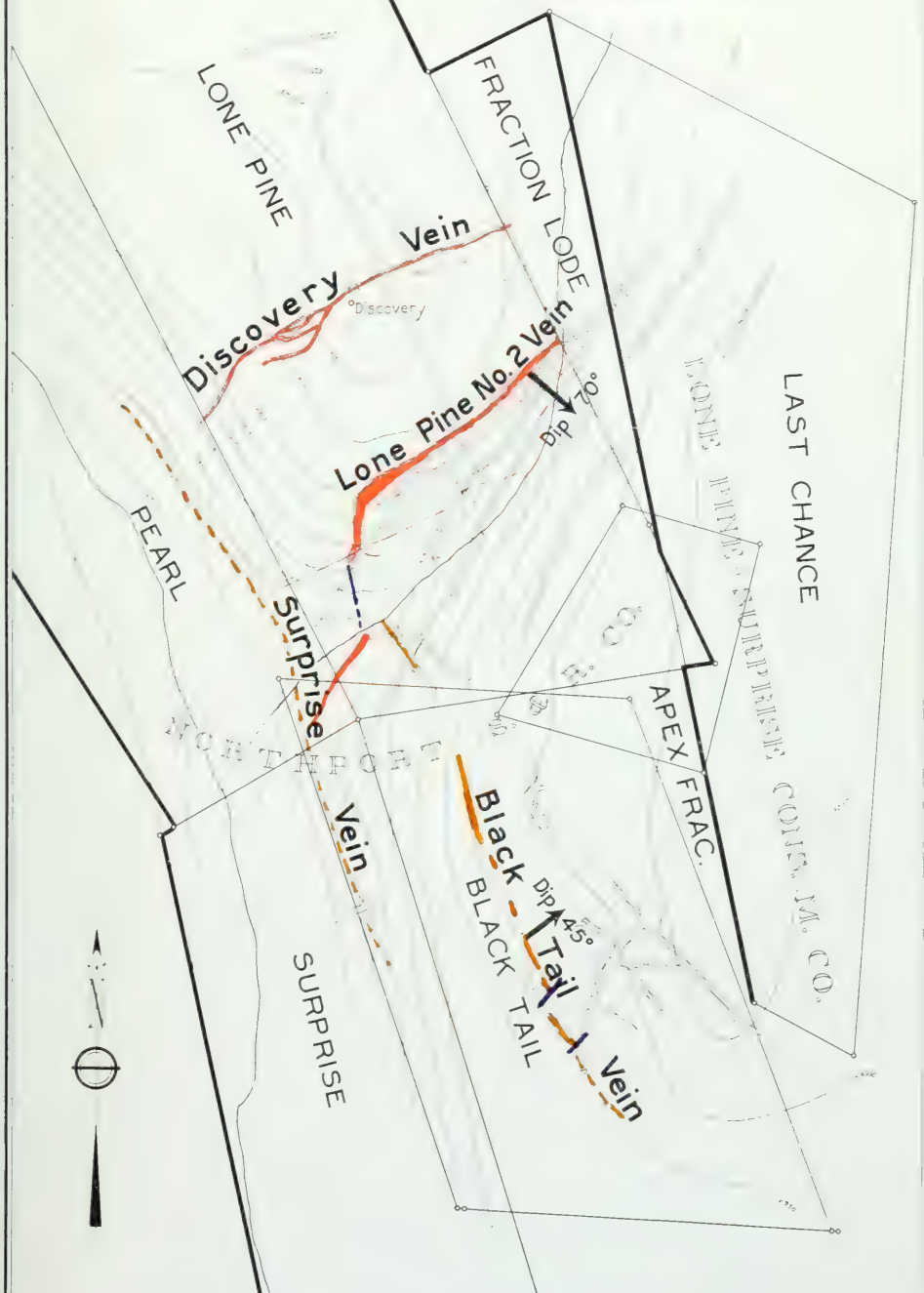
The apparent curvature of the apex of the main segment of the Lone Pine No. 2 vein at its westerly end is attributable, as the court will observe, to the normal migration of the intersection of this apex with the steep hill slope as evidenced by the contours. In other words, the apex on its onward course has been sliced off and exposed along the steeply descending hillside and the general strike of the vein has not been materially affected by this situation (R. pp. 132-135, 471).

The various workings on the Lone Pine No. 2 vein beneath the surface of the Lone Pine and Last Chance claims are indicated by the shaded areas extending downward in the direction of the dip of the Lone Pine No. 2 vein. A comparison of the exhibits introduced by both sides will indicate that

COMPOSITE

FROM
SURFACE AND UNDERGROUND MAPS
(Exhibits Nos 26 and 27)

Scale of Feet
0 100 200 300 400 500





there was no very great difference in the presentation and interpretation of these facts, except where we approach critical points. In view of the fact that the main issues here involved are questions of law, and the physical features, outside of those in controversy, are comparatively unimportant, a further statement of the physical facts will be reserved until their discussion under appropriate headings.

The Issues.

Appellee rests its defense in this case upon three propositions, any one of which is sufficient to defeat the claims of appellant.

1. The main issue is one of law, and is, in our opinion, determinative of this case. It was admitted by appellant that the apex of the discovery vein existing at the discovery point on the Lone Pine claim could be followed practically without interruption across both opposite side lines of the Lone Pine claim, and extending substantially at right angles to these side lines. The position of the apex of this discovery vein, which was disclosed by practically continuous trenching across the Lone Pine claim, is indicated on the plat inserted hereinbefore. The Lone Pine No. 2 vein was claimed by appellant to have been known to exist at the time of the location of the Lone Pine claim or shortly thereafter, and at least prior to issuance of patent. According to its contention this vein turns practically at right angles and becomes what is commonly

known in that district as the Black Tail vein, passing out through the southerly end line of the Lone Pine claim. According to the contention of opposing counsel this vein is found entering the easterly side line of the Lone Pine claim, and turning sharply at right angles becomes the Black Tail vein, passing out through the southerly end line of the Lone Pine claim, changing not only its strike practically at right angles to its former course, but also dipping at right angles to the Lone Pine No. 2 vein. The relation of the two veins is illustrated on the plat hereinbefore inserted. Appellant also claims that this Lone Pine No. 2 vein, being known to exist, at least prior to the issuance of patent, is what opposing counsel assert is a primary vein as far as the Lone Pine claim is concerned. That being one of the primary veins, as is also the discovery vein, appellant has the privilege of selecting for extralateral right purposes which of these two primary veins will best serve its purposes.

It is the contention of appellee on the other hand that the position of the apex of the discovery vein with reference to the surface boundaries of the Lone Pine claim absolutely controls the direction of the extralateral right or rights which may be asserted by virtue of the ownership of that claim, and since the apex of this discovery vein crosses both side lines practically at right angles, dipping in the direction of the southerly end line of the claim, that the side lines become end lines for extralateral right purposes on all veins which are found to apex

within this claim. That, as a corollary, in following this No. 2 Lone Pine vein, appellant is limited by the easterly side line of the Lone Pine claim extended downward vertically, since it has become for extralateral purposes an end line, or, as the courts have termed it in descriptive phraseology, a "side-end line".

2. We will point out in an appropriate portion of this discussion hereinafter, the fact that the Lone Pine No. 2 vein was known to extend crosswise of the Lone Pine claim practically ever since its existence first became known, and that to call it the Black Tail vein and claim that it is an extension of the Black Tail vein, turning practically at right angles to the normal course of the Black Tail vein, was an afterthought devised and planned for the purposes of this litigation. As a matter of fact the Lone Pine No. 2 vein does not turn at right angles and cross the southerly end line of the Lone Pine claim, but is faulted for a short distance and continues on in the same southwesterly direction across the Lone Pine claim, its apex crossing the westerly side line of the claim a few feet northerly from the southwest corner of the Lone Pine claim. This faulted segment appears on the plat inserted hereinbefore. The Black Tail vein is an entirely distinct vein belonging to another series, extending on in a northwesterly direction for an indefinite distance within the Lone Pine claim. Therefore, even assuming that opposing counsel's erroneous assumption that there can be more than

one discovery or primary vein within a mining claim, were actually the law, this Lone Pine No. 2 vein, which they contend to be a primary vein, also crosses both opposite side lines of the Lone Pine claim. In view of our conviction that the law as announced by the learned trial court is eminently correct, we are of the opinion that this second issue is unimportant, and we only discuss this feature of the case because it has been urged so strongly by opposing counsel.

3. As a third defense (and one which we also consider unimportant by reason of the strength of the first defense above noted) we contend that to allow appellant an extralateral right on the Lone Pine No. 2 vein, as claimed by it, would result in granting the right to follow not only this Lone Pine No. 2 vein as it crosses the easterly side line of the Lone Pine claim, but also each of the other veins found within the Lone Pine claim, viz., the No. 1 vein, the discovery vein, and the No. 4 vein, more on their strike or onward course than on their dip or downward course.

I.

THE DISCOVERY VEIN OF THE LONE PINE CLAIM ADMITTEDLY CROSSES BOTH OPPOSITE SIDE LINES OF THE LONE PINE CLAIM.

On this point the trial court said:

“It was conceded at the trial, or at all events there was no controversy over the fact, that the strike of the discovery vein of the Lone Pine claim is substantially parallel to the end

lines of the claim, and that the discovery vein passed out through and beyond both side lines.”

(R. p. 35.)

Northport S. & R. Co. v. Lone Pine Surprise
C. M. Co., 271 Fed. 105, 109.

Opposing counsel in brief of appellant, page 5, state that

“the appellant does not dispute that at the point where the notice of location was posted there is a branching quartz vein which does cross the opposite side lines of the claim.”

That this was the original discovery vein will be found from an examination of the following testimony: Creasor, R. pp. 423, 426-7; Ryan, p. 524; Robbins, p. 396; these witnesses being the three locators of the Lone Pine claim.

The bill of complaint alleged the discovery of a vein or lode, and that the locators “posted a notice upon said claim at the point of discovery” (R. pp. 3-4). The fact of the making of said discovery on said vein is further alleged in appellee’s complaint in paragraphs VII to X inclusive (R. pp. 4-6). The answer admits these allegations of the complaint (R. p. 19).

The location notice contains the following statement:

“This notice is placed at discovery post.”

(R. p. 675.)

When the Lone Pine claim was surveyed for patent the original locator, Creasor, pointed out to the deputy mineral surveyor the cut exposing the vein

in the vicinity of the location notice as the discovery point (R. pp. 170-2). The official field notes embraced in the patent record (Exhibit 11) contain five references to the "discovery cut" and the "discovery", giving its position (R. pp. 576, 594, 654, 666, 683).

The plat of the official survey (Exhibit 12) shows the position of the "discovery" (R. p. 684).

The patent calls for the "discovery cut" of the Lone Pine claim, identifying it by course and distance as the cut above referred to, and in which the discovery vein is disclosed (R. p. 692).

Opposing counsel have endeavored to minimize the importance of this discovery vein. The assays from this vein ran from \$1.00 to \$7.00 taken in the immediate vicinity of the discovery cut at regular intervals on each side (Exhibit 33, R. pp. 406-7, 714).

There were sixteen inches in width of solid quartz exposed in the discovery cut and the vein widened out to five feet in width of quartz only a few feet away.

Wiley, R. p. 466; Burch, p. 306; Lakes, p. 350;
Robbins, p. 404; Clarke, p. 457.

Sec. 2320 of the mining statute contemplates the existence of but one discovery vein upon which a lode location shall be based.

In the determination of rights granted by the mining statute, the language of the statute itself is controlling.

Section 2320 of the Revised Statutes provides that

“* * * no location of a mining claim shall be made until *the discovery of the vein or lode* within the limits of the claim located. No claim shall extend more than 300 feet on each side of the middle of *the vein* at the surface.
* * * ”

Words could not be plainer than that but *one* vein was intended as a discovery vein, and that the 300 feet in width of the surface area was to be measured out on each side of “*the vein* at the surface. * * * ”

Sec. 2322 of the Revised Statutes grants to the locator, in addition to his discovery vein, “all veins, lodes and ledges, etc.,” found to apex within the surface lines of the claim. This was a departure from and addition to the grant under the former act of 1866, which only gave the locator the one original discovery vein apexing within his surface lines. As was said by the Supreme Court of the United States in commenting on this statute:

“* * * so that a location gives to the locator something more than the right to *the vein which is the occasion of the location*. * * * ”

Campbell v. Ellet, 167 U. S. 116, 120.

The case of Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 88, also interprets the statute in the same manner.

“We pass, therefore, to an examination of the provisions of the statute. Premising that the discoverer of *a vein* makes the location, that he is entitled to make a location not exceeding 1500 feet in length, along the course of *such*

vein and not exceeding 'three hundred feet on each side of the middle of the vein at the surface' * * * that it will be assumed that he will take all of the length of *the vein* that he can, we find from Section 2322 that he is entitled to all veins, lodes and ledges throughout their entire depth the top or apex of which lies inside of 'such surface lines extended downward vertically'."

A little later the court again said, in commenting on an appeal from a decision of this court (9 C. C. A.):

"What limits this right to a secondary vein extralaterally? The statute says vertical planes drawn downward through the end lines of the location. What end lines? *Those of and determined by the original location and lode*, the Circuit Court of Appeals decided. Those determined by the direction of the newly discovered lodes, regardless of whether they were originally intended as end lines or side lines, the appellant, as we have seen, contends. The court of appeals was right."

Walrath v. Champion Mining Co., 171 U. S. 293, 306.

"But rights on the strike and on the dip of *the original vein*, and rights on the strike and on the dip of the other veins, we have decided are determined by the end lines of the location."

Id., p. 311.

The same court again said:

"A locator, therefore, is not confined to *the vein upon which he based his location and upon which the discovery was made.*"

Calhoun Gold M. Co. v. Ajax Gold M. Co., 182 U. S. 499, 508.

The General Land Office very early (1880) interpreted this statute in the only way that it can be logically interpreted:

“The law contemplates that he shall make his location on *one vein*, and while certain rights attach to other veins whose top or apex is found within his surface boundaries, yet *but one vein can be made the basis of his location.*”

In re Helvetia Lode, Copp’s Mineral Lands,
p. 279;

United States Mining Statutes Annotated,
J. W. Thompson, Vol. I, p. 54.

That there can be but one discovery lode is the unanimous opinion of all the text writers who have expressed an opinion on the subject.

“One thing seems quite certain—the law, as at present construed, may compel the inquiry, where two veins are found to exist within a claim, as to *which one was discovered first*—that is, *which vein was the basis of the location*—and there exists to this extent a distinction between the two classes of veins.”

Lindley, 3rd Ed., Vol. II, p. 1399 (Sec. 594).

Commenting on this statement of Judge Lindley’s, Mr. Henry Arnold, in a masterly analysis of certain extralateral cases, states:

“In other words, where two veins are found to apex within the surface territory of one location, no distinction is to be drawn between them, but both are to be treated as of equal dignity—unless a question arises as to some point concerning, or dependent on, the drawing or character of the boundaries of the location, in which event, but in which event only, an inquiry

as to *which is the discovery vein* (that is, as to *which vein served as the basis of location*), becomes of moment."

22 Harvard Law Review, pages 278, 279.

"118k. Extralateral rights on secondary (incidental) veins—that is, on veins other than the discovery (original or principal) vein—are determined with reference to those lines, which for the discovery (original or principal) vein's extra lateral rights are the end lines of the claim."

Costigan on Mining Law, page 440.

"There can be but one set of end lines for all the veins covered by the patent; and where departure from one or both side lines renders it material, *only the discovery vein* can be used to determine what are the planes of the end lines."

Morrison's Mining Rights, 15th Ed., page 215.

That the one discovery vein and only the discovery vein is all-important in determining the extralateral rights of the claim is further emphasized in the following cases:

Silver King Coalition Mines Co. v. Conkling M. Co., 41 Sup. Ct. Rep. 426;

Montana M. Co. v. St. Louis M. & M. Co., 204 U. S. 204, 206;

Stewart Mining Co. v. Ontario Mining Co. (Idaho), 132 Pac. 787, 793;

Ajax Gold Mining Co. v. Hilkey (Colo.), 72 Pac. 447, 449;

Anaconda Co. v. Pilot Butte Co. (Mont.), 156 Pac. 409.

“It is now settled law that the legal end lines of *the original or discovery vein* are the end lines of all veins within the surface boundaries with respect to extralateral rights.”

Jefferson M. Co. v. Anchoria-Leland M. & M. Co. (Colo.), 75 Pac. 1070, 1073.

“The course of *the primary or discovery vein* definitely determines the end lines and side lines for *all* veins having their apexes within the exterior boundaries of the location.”

U. S. Mining Statutes, Annotated by J. W. Thompson, Part I, page 149.

The foregoing authorities will abundantly establish the fact that the courts only contemplate that there shall be but one primary or discovery or original vein upon which the location is based. This is necessarily so from the very nature of the case, for if a locator could base his claim upon more than one vein, there would be no consistency in the Federal Mining Statute (Section 2320 U. S. Revised Statutes), which plainly and unequivocally provides that a location shall not exceed 1500 feet “in length along *the vein or lode*”, and which further provides for

“the discovery of *the vein or lode* within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of *the vein* at the surface.

* * * ”

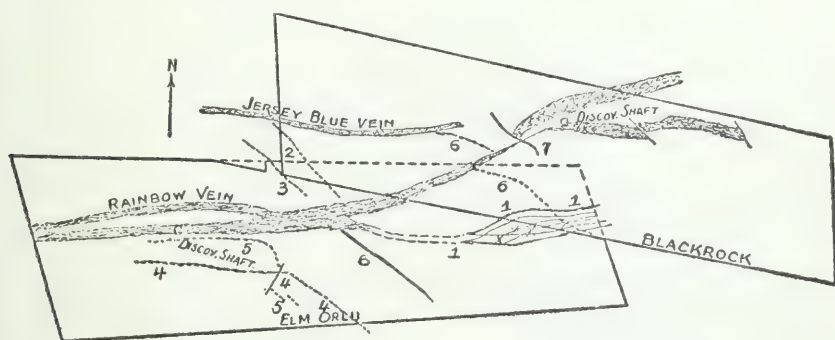
The statute does not say "discovery of veins or lodes", as counsel urge, but expressly limits the discovery to "*the vein or lode*". What vein? As all the authorities hold, the one discovery vein. This basic and controlling statute necessarily and in so many words contemplates the discovery of but *one vein or lode*, which shall be used as the basis for laying out the lines of the location. If the statute had contemplated that more than one vein or lode could form the basis of the location, the statute would not have specifically limited the discovery to the one vein or lode. It would be a manifest physical and practical impossibility and an absurdity to attempt to lay out the lines of an ideal mining location as contemplated by the statute, both in length along the lode and also "on each side of the middle of the vein at the surface", if more than one vein or lode could be used as the basis for the location.

Clark-Montana Co. v. Butte & Superior Co.

This case, reported in 233 Fed. 547, constitutes the main reliance of opposing counsel on this appeal. There has been inserted in brief of appellant, at page 12, a purported reproduction of the diagram accompanying the opinion found on page 552 of the 233 Federal. This reproduction in appellant's brief is in the main accurate with one very vital exception. A segment of the branch of the Rainbow vein within the Black Rock claim appears on appellant's diagram to cross the north side line of the Black

Rock claim. This is the extreme right hand segment of vein showing on the plat found in appellant's brief at page 12. An examination of the diagram contained in 233 Fed., at page 552, discloses no such crossing of the side line of the Black Rock claim by this branch of the Rainbow vein.

For convenient reference and comparison we reproduce at this point an exact copy of the sketch or diagram found in 233 Fed.



An examination of Judge Borquin's opinion will disclose that he expressly states that he does not know where the extension of this branch of the Rainbow vein is to be found. In speaking of the Rainbow vein he says that it "branches in the Black Rock, one strand crossing the Black Rock north side line, and *one coursing easterly a disputed distance*" (p. 552). And again, on page 571 of the report he says:

"The Rainbow strand easterly from the Black Rock discovery shaft extends about 400 feet east and to within 250 feet of the Black Rock east end line, where it is cut off by a northwest fault."

He finds against the contention of the defendant that this easterly strand crosses the Black Rock east end line, but says:

“It is probable that the eastern segment of the easterly strand was faulted to the north and may appear in a trench north of the Black Rock north side line. * * * Considering the evidence in connection with the patent presumption, it does not persuade that the easterly strand crosses the east end line.” (p. 572.)

It is quite clear from these excerpts and the remainder of the opinion bearing on this question, that Judge Borquin not only distinctly found that the evidence did not demonstrate that this easterly strand crosses the easterly end line of the claim, but he also was in doubt as to where this further extension might be found, but with the probability in favor of its being faulted northerly of the Black Rock north side line.

It is true that Judge Borquin in his opinion used language which would lead to the conclusion that he considered both the Rainbow and Jersey Blue primary veins, in spite of the fact that the discovery shaft exists upon the easterly strand of the Rainbow. He says:

“Neither the Jersey Blue nor the Rainbow is a secondary vein. Both are primary. The Jersey Blue overlaps the Rainbow. * * * That the Rainbow crosses both side lines is not controlling. There can be but one set of end lines, and if the located end lines fixed extra-lateral rights upon one vein, *as they do upon the Jersey Blue*, they fix them upon all veins.” (page 571.)

It is quite apparent that this language is inconsistent, in view of the fact that the court states at the outset that both the veins are primary, and then concludes his discussion by stating that he has selected the Jersey Blue as determining the end lines, and that all other veins are consequently governed by those end lines. In other words, he has virtually stated that he has found the Jersey Blue to be the primary vein, and that it follows as a natural corollary that the end lines controlling extralateral rights on the Jersey Blue would control all other veins, which necessarily and logically would become secondary veins, including the Rainbow.

It is to be observed that Judge Borquin concludes that the fact "that the Rainbow crosses both side lines is not controlling". If Judge Borquin found the Rainbow to be a discovery vein, and also if the Rainbow vein crossed both side lines, then his holding would be diametrically opposed to the ruling of the Supreme Court of the United States in the case of *King v. Amy & Silversmith Cons. M. Co.*, 152 U. S. 222, and also to the more recent case of *Silver King Coalition Mines Co. v. Conkling Mining Co.*, 41 Supreme Court Reporter 426, 427, also decided by the same court in April of this year.

Judge Borquin's conclusion on this point can only be reconciled with this express ruling by the highest court in the land, on either one of two theories:

1st: That he fixed "extralateral rights upon one vein", namely, the Jersey Blue, and that consequently that fixed them upon "all veins" (233 Fed. 571). This rule, however, would be equivalent to holding that the Jersey Blue was the discovery vein, which is utterly inconsistent with the fact that the discovery shaft of the Black Rock claim was placed upon the easterly branch of the Rainbow vein and that the Black Rock location notice and patent referred to this as the discovery point.

2nd: A more logical way to uphold Judge Borquin's decision would be to consider the easterly branch of the Rainbow vein upon which the discovery shaft is situated, as the discovery vein upon which the Black Rock claim was predicated. As Judge Borquin found, this vein extended substantially parallel with the side lines of the claim for several hundred feet in an easterly direction from the discovery shaft, where it was cut off by a fault about 250 feet from the easterly end line. The further extension of this easterly branch or strand of the Rainbow vein was not found by the court to exist within the Black Rock claim.

(As we have noted, opposing counsel's plat, opp. p. 50 of appellant's brief, purporting to be a copy of the illustration found in 233 Fed. 552, is erroneous insofar as it shows a segment of the easterly strand of the Rainbow vein crossing the north side line of the Black Rock.)

The court stated the probability was that it had been faulted so that its onward extension was found

northerly of the north side line of the Black Rock claim. In other words, it had been faulted outside of the surface boundaries of that claim. It is well recognized law that where a vein has a considerable extent within a claim in a longitudinal direction, substantially parallel with the side lines of the claim, and has then been faulted so that its further extension within the claim is not found, extralateral rights will be awarded in the direction of the end line planes up to a plane passed through the point of faulting or termination of such vein within the claim.

Carson City M. Co. v. North Star M. Co., 73 Fed. 597, 602-3;

Same case affirmed by this court (9th C. C. A.), 93 Fed. 658, 669;

Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 90-91;

Del Monte Co. v. New York M. Co., 66 Fed. 212, 215;

Wall v. U. S. M. Co., 232 Fed. 613, 615;

Tyler M. Co. v. Sweeney, 54 Fed. 284, 292;

Lindley on Mines (3rd Ed.), pages 1363-1364;

Costigan on Mining Law, pages 427-429.

Judge Borquin's decision was so overwhelmingly in favor of the plaintiff in that case that evidently plaintiff was satisfied to abide by his ruling and did not see fit to appeal on this point. The defendant, in whose favor the ruling would operate, naturally did not raise the question on appeal, and it was not presented for determination either before this court

in 248 Fed. 609, nor in the Supreme Court of the United States in 249 U. S. 11.

If Judge Borquin's decision on this point cannot be based upon the grounds suggested, then his holding is diametrically opposed to the unmistakable language of the mining statute, which, as already pointed out, contemplates the discovery of but *one* vein or lode which shall furnish the basis of the location, and the measuring of the exterior boundaries therefrom. It is also opposed to the express ruling of the Supreme Court of the United States, and all of the other courts that have spoken upon the question, namely, that a discovery vein which crosses both opposite side lines of the location changes the direction of the extralateral rights of that location so that the side lines become end lines for all purposes, including the measuring of rights on all other veins found within the limits of that location and which are necessarily secondary veins.

As the learned trial judge said in deciding the case at bar by way of comment on Judge Borquin's decision:

“The decision itself is out of harmony with the language of the courts in the many extralateral right cases decided during the last half century. In all of these cases it seems to have been taken for granted, if not decided, that the principal effect of the act of 1872 was to extend the grant, so as to include all veins or lodes having their top or apex within the surface boundaries, but with the same end lines, the same side lines, and the same extralateral rights as properly appertain to the discovery vein,

which forms the basis of the location and patent.”

(271 Fed. 105, 112.)

The side lines of a mining location become end lines in contemplation of the law where the discovery vein crosses both opposite side lines.

It has long since become well settled law that where the apex of the discovery vein crosses both opposite side lines of the claim that these side lines become what the courts have termed “side-end lines”, and for extralateral purposes the original side lines extended vertically downward limit the rights extralaterally, and beyond these planes the locator cannot go. This limitation is applicable to all veins found to apex within the claim. Opposing counsel apparently concede that this is the law, with the exception that they contend that there can be more than one primary vein, for they state in appellant’s brief at page 9:

“If the vein at the point where the location notice was posted is the only original or discovery vein of the Lone Pine claim, the side lines of that claim become end lines and the appellant cannot succeed.”

It is therefore unnecessary to discuss this proposition extensively, and we merely cite the leading case of *King v. Amy & Silversmith Cons. M. Co.*, 152 U. S. 222, where the court says at page 228:

“In the Amy claim, the lines marked as side lines cross the course of the strike of the vein and do not run parallel with it. They, therefore, constitute end lines.”

Justice Miller, while on the Supreme bench of the United States, charged a jury in the case of *Stevens v. Williams*, 1 McCrary, 480, 490, as follows:

“The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode, so as to cover it exactly. *His location may be made one way or the other, and it may so run that he crosses it the other way.* In such event his end lines become his side lines, and he can only pursue it to his side lines, vertically extended, as though they were his end lines. * * *

And the Supreme Court of the United States has again announced this same rule on April 11th of this year in the case of *Silver King Coalition Mines Co. v. Conkling Mining Co.*, 41 Sup. Ct. Rep., 426, 427.

The side lines become end lines not only of the discovery vein but of all other veins apexing within the limits of the claim.

This doctrine has been laid down in the cases already cited and in the cases noted by the Supreme Court of the United States in the *Silver King Coalition-Conkling* case (41 Sup. Ct. Rep. 427). Justice Field, speaking for the Supreme Court of the United States in the case of *Iron Silver Mining Co. v. Elgin Mining Co.*, 118 U. S. 196, 207, stated that the same end line planes were to control in the case of *all* veins found to apex within a mining claim.

This court has held,

“* * * that, end lines having been once established, they become end lines for all veins found within the surface boundaries.”

St. Louis M. & M. Co. v. Montana M. Co. (9th C. C. A.), 104 Fed. 664.

The case of Cosmopolitan Mining Co. v. Foote, 101 Fed. 518, was a case possessing many points of similarity to the case at bar. In that case the discovery vein of the Badger location crossed the claim practically at right angles to the side lines and parallel to the end lines, just as does the discovery vein of the Lone Pine claim. A secondary vein also existed within the limits of the Badger location, the apex of which extended practically at right angles to the discovery vein and parallel to the side lines. The owner of the Badger claim contended that he was entitled to follow this secondary vein as it dipped extralaterally beyond his side line and beneath the surface of an adjoining location, the Cosmopolitan. The court held, however, that since the discovery vein ran crosswise of the Badger location, that therefore the located side lines became end lines and, as such, determined the extralateral right planes *for all lodes*. As a result the owner of the Badger claim could not exercise any extralateral right on the secondary vein beyond the vertical side boundary of the Badger claim. A diagram illustrating this case will be found at page 1397 of Vol. 2 of the third edition of Lindley on Mines, where this case is discussed.

Therefore, unless all of the law which has heretofore been announced by the Supreme Court of the United States and the other courts which have spoken on the subject, as well as the text writers, is to be overturned and even though appellant in this case were successful in its contention that the large Lone Pine No. 2 vein swung around almost at right angles and passed out of the southerly boundary of the claim as a weak and comparatively inconsequential Black Tail vein, this fact would be of no avail in the light of the positive language of the statute and all these decisions.

In any event, the Lone Pine No. 2 vein was not known to exist at the time the location was made.

We have pointed out the fact that the whole sequence of events from the date of the original location down to and including the issuance of patent establishes conclusively that the vein disclosed at the point of the posting of the notice on the Lone Pine claim was the discovery vein. Every act of the locators at a time when there was no possible incentive to obscure the true situation, is consistent with the fact of this discovery of the vein crossing the claim through the discovery cut.

Creasor, the man who had more to do with the making of the Lone Pine location than anyone else, testified that he came upon the ground which he located as the Lone Pine from the north, along the top of the ridge within what is now that claim, until he reached what he considered was quartz in place

(R. pp. 422-3, 426). This he positively identified as the discovery vein, and at this place he cut off a small pine tree and upon the portion which he left standing he wrote his notice of location (R. p. 423). The outcrop of the discovery vein was only $8\frac{1}{2}$ feet north of this discovery post. It is in the exact center of the claim, being equidistant from the end lines and from the side lines as well. He testified positively that he had not seen the Welty boys on the ground up to that time (R. p. 427), and that at that time he did not "know there was such a thing as the Black Tail Claim" (R. p. 434). Mr. Creasor testified positively that he did not know of the existence of the No. 2 Lone Pine vein until the 6th of March (R. p. 429), or approximately a week after the Lone Pine claim had been located. On the 6th of March, after having returned from his long trip out to record the location notice, Mr. Creasor carefully went over the Lone Pine ground and first noted the No. 2 Lone Pine vein (id.).

Mr. Ryan, the only other one of the three locators, who was actually on the ground at the time of location, testified that the first quartz was found up at the Lone Pine tree (R. p. 522), and it was only later, when he had located the Last Chance claim (which took place on the following day) that he knew anything about the outcrop of the No. 2 vein. He testified that the Lone Pine "*was already located at that time*" (R. p. 523).

We have this positive testimony of both of the original locators of the Lone Pine claim who actu-

ally participated in the acts of location, that the quartz of the discovery vein had been discovered at the point where the location notice was posted, and the claim had been located before either of them knew of the existence of the Lone Pine No. 2 vein, which, though it had a bold outcrop, was so stained and covered with lichen and surface discoloration, that it was not distinguishable from the ordinary country rock except upon close inspection (R. p. 444).

To attempt to overcome this positive testimony of the locators of the Lone Pine claim, plaintiff called as a witness John Welty, who testified that he pointed out to Creasor and Ryan from his Black Tail discovery on the Black Tail claim, the croppings of the Lone Pine No. 2 vein (R. p. 208). In view of the fact that the croppings of the Lone Pine No. 2 vein are not visible from this discovery point, and in view of the fact that both Ryan and Creasor testified that they did not know of the Black Tail vein until after making their location, this testimony is obviously incorrect. When pressed on cross examination Welty weakened and stated that it was hard to remember things so many years ago (R. p. 209), and he could not recall dates because "it is too far gone" (R. p. 211). On cross examination he admitted he was not positive that Creasor was on the Black Tail before he located the Lone Pine (R. p. 211). One fact in this connection is worth noting, and that is that Welty testified that he could see the Lone Pine No. 2 vein outcropping on the Lone

Pine claim for probably "100 feet at least that cropped out prominently" (R. p. 212). An examination of the plat and the position of the croppings of this Lone Pine No. 2 vein as it existed at that time, and being that portion that opposing counsel are pleased to designate as the extension of their Black Tail vein, necessarily had a course nearly across the Lone Pine claim in a northeasterly and southwesterly direction, and practically at right angles to the strike of the Black Tail outcrop. How anyone could consider an outcrop of this character, crossing the Lone Pine claim nearly at right angles, an extension of the Black Tail vein, places a considerable strain upon the logic and consistency of the far-fetched argument advanced by opposing counsel that the Lone Pine claim was located as an extension of the Black Tail claim.

It is also worthy of comment to note that if Welty knew of this alleged extension of the Black Tail claim into Lone Pine ground that he did not cover it with his Black Tail claim, which was a prior claim in point of time, and yet which is only 900 feet in length, as appears from the District Map of Claims in this vicinity introduced in evidence (Exhibit No. 13).

In passing it might be well to call attention to the human probabilities of the situation here involved. If the "great" Lone Pine No. 2 vein outcrop had been discovered and recognized as such by the locators of the Lone Pine claim at the time the location was made, does it not stand to reason that the loca-

tors would have placed their discovery notice on this large vein rather than at the discovery point where it was actually posted in close proximity to the much smaller discovery vein?

Mr. Ralston, after testifying very positively as to his conception of the existence of the Black Tail vein within Lone Pine ground, and its relation to the Lone Pine No. 2, and the fact that he had the opinion at the time he made the patent survey that there was a vein running longitudinally through the Lone Pine claim substantially corresponding with the lode line that he surveyed, had to admit on cross examination that in March of 1899 he had prepared a plat (Defendant's Exhibit No. 14, R. p. 703) which showed the only veins then known within the Lone Pine claim and which were, according to his conception, cross veins, one of which, as portrayed on his plat, corresponds very closely to the position of the outcrop of the Lone Pine No. 2 (R. p. 190). He also prepared a report in 1900 describing these cross veins and no mention whatever was made of any north and south veins. (R. pp. 191, 198, 201, also Exhibit 15, pp. 708-9.) He also testified that the No. 1 Tunnel which he described in his report accompanying the official survey, was in 150 feet extending a short distance north of the open stope on the No. 2 vein (R. p. 177). It is manifest from all the maps and models that this tunnel cross-cut the vein practically at right angles, so that at the time he made his patent survey he knew as positively as did everybody else who saw or examined the prop-

erty that this No. 2 vein ran across the claim nearly at right angles to its length, as did the discovery vein, the Lone Pine No. 1 vein, and the Lone Pine No. 4 vein, as well as numerous other smaller veins. At the time of the location, at the time of the patent survey, and up to the date of the issuance of the patent, which was March 2nd, 1899 (R. p. 699), there was no evidence that there was any known vein whatsoever within the Lone Pine claim, running northerly and southerly, as claimed by opposing counsel in their brief (see appellant's brief, pp. 34-37).

Mr. Robbins, the third locator of the Lone Pine claim, and who was manager and in charge of the development of the property for a great many years after its location, examined the veins exposed in this claim carefully in 1896 (not in 1897, as erroneously stated in appellant's brief at p. 35), when he first visited the property in September following the location, and determined that they were east and west veins, and though he looked for a north and south vein he did not find one. He also testified that the first evidence of any north and south vein existing within the Lone Pine claim was not exposed until the year 1900, which, it will be noted, was the year following the issuance of the patent (R. pp. 403, 404). On cross examination he stated positively that when he examined the claim in 1896 he saw nothing but east and west veins. "I was under the impression that we had a north and south vein

from the way the claim was located, *but we did not find it*" (R. p. 411).

The trial court also concluded from the testimony:

"Furthermore, there was no known vein extending lengthwise of the Lone Pine claim at the time of location, or even at the time of patent. There was nothing on the surface to indicate that the Black Tail vein extended that far to the north. * * *"

R. p. 44.

II.

THE LONE PINE No. 2 VEIN DOES NOT TURN ALMOST AT RIGHT ANGLES AND PASS OUT OF THE LONE PINE SOUTHERLY END LINE.

The mining statute which controls these rights in question is so positive in its language that only one discovery vein or lode can exist within the contemplation of its terms, and all the authorities that have spoken upon the subject, including the Supreme Court of the United States, with the one exception of Judge Borquin's Montana Realty-Butte & Superior decision, are so unanimous in their interpretation of this statute, that it would seem superfluous and a waste of the valuable time of this court to discuss the other problem which has been so elaborately considered in the brief of appellant, namely, that if the Lone Pine No. 2 vein can also be considered as a discovery or primary vein, and if it can be demonstrated to turn almost at right angles and be proven to become the Black Tail vein, and to cross

the southerly end line of the Lone Pine claim, that appellant can elect which of these primary veins it will select for extralateral right purposes. They have taken the position that they can ignore entirely the existence of the discovery vein crossing the Lone Pine claim almost at right angles, and adopt their alleged Black Tail vein as a primary vein, which shall determine the direction of the extralateral rights, and upset what had been supposed for twenty years to be the rights attaching to the Lone Pine claim, and follow this alleged Black Tail-Lone Pine No. 2 vein more along its strike than its dip underneath the surface of the Last Chance claim belonging to its neighbor, and take away practically all of the valuable ore bodies from the Last Chance mine. We leave the consideration of the problems just discussed with the utmost confidence that this court will uphold the decision of the learned trial judge, to the effect that it is absolutely unnecessary to enter into any discussion of what becomes of the Lone Pine No. 2 vein in view of the fact that it is a secondary vein as far as the Lone Pine claim is concerned. However, in view of the importance which opposing counsel have placed upon this feature of the case, we cannot in justice to our client ignore the issue raised by appellant in its brief, and we will proceed to point out to this court that even assuming that this strained conception of the law governing this case urged by opposing counsel be correct, nevertheless plaintiff below did not meet the burden of proof placed upon a party asserting

extralateral rights, and did not establish the crossing of the southerly end line of the Lone Pine claim by the apex of the Lone Pine No. 2 vein.

The Lone Pine No. 2 vein not only crosses the easterly side line of the Lone Pine claim, but it passes out through the westerly side line as well.

It should be kept in mind that according to the testimony of appellant's witnesses they were working on their theory of the case for a year prior to bringing this suit, and also pursued these developments for a year thereafter before the trial of the case. During this period of two years which preceded the trial they were unable to establish the fact that the Lone Pine No. 2 vein turned practically at right angles and crossed into the Black Tail claim through the southerly end line of the Lone Pine claim. An examination of the models and maps will indicate that the Lone Pine No. 2 vein had during a period of many years been mined down to a depth of 600 feet on five different levels; that the only ore bodies mined along these levels had the general trend of the No. 2 vein crossing the Lone Pine claim easterly and westerly (Record pp. 109, 79, 105, 164, 247); that all of these ore bodies terminated fairly sharply and suddenly in a westerly direction, and if the vein had continued on around a bend nearly at right angles to its former strike and become the Black Tail vein, occupying a more northerly and southerly course, it should have been in this long period of time a comparatively easy matter for

plaintiff below to have developed this turn on some one or the other of these various levels and absolutely demonstrated its theory. A careful examination of the testimony of plaintiff's witnesses will indicate that while some of them tried to point out various minor features occurring on these levels which would indicate a turning, and though some of them admitted that it would only take a few feet of development work, which could have been done in a few days, to have disclosed this alleged turning of the vein on these levels (R. pp. 114, 123-124, 247-8), there was no real evidence of any turning, and the work which could easily have been done in a few days, according to their own admissions, for some unaccountable reason was not prosecuted. Some work was done on these levels but abandoned, evidently because the results did not satisfy appellant. It is only on the Lone Pine No. 2 tunnel level that there was any real attempt made to establish their theory. An examination of plaintiff's Exhibit 4, which has been reproduced opposite page 50 of appellant's brief, but with a very important omission, will indicate how weak and unconvincing are the facts which they have attempted to expose within this two-year period of development. An examination of the original exhibit will indicate that appellant has omitted from its reproduction of this exhibit in this brief, the segment of vein found to exist and outcrop at the surface, and crossing the westerly side line of the Lone Pine claim just a few feet north of the southwest corner of that claim.

The position of this segment of vein is indicated on the illustrative plat inserted in this brief at the outset, and from its position on the ground and the intervention of the fault, which accounts for the sudden westerly termination of the stopes of the main Lone Pine No. 2 vein, it is quite evident that this segment of vein crossing the westerly side line of the Lone Pine claim is the faulted extension of the main Lone Pine No. 2 vein.

An examination of the original plaintiff's Exhibit No. 4, which is a map of appellant's own making, and which shows the Lone Pine No. 2 vein at the point of its nearest approach to this side line segment, will demonstrate the almost identical correspondence in strike between these two segments. This faulted segment of the Lone Pine vein was only put on this exhibit after considerable urging by counsel for appellee (R. pp. 129-131), and is again omitted from appellant's reproduction of this exhibit in its brief. This side line vein segment was admitted by appellant's own witnesses to be a "strong appearing vein," varying from 3 to 6 feet in width in places (R. pp. 70-71, 128, 232, 357, 405, 455, 477), and the assay introduced in evidence by appellee established that this side line segment carried values of over \$20.00 (see Defendant's Exhibit No. 32, R. p. 713, and Lake's testimony, p. 358). This corresponds in value to the values recovered from the main segment in Lone Pine No. 2 workings, where the ore averaged \$17.00 (R. p. 451).

On the other hand, if the court cared to take the time and it were essential to a determination of this case, which we firmly maintain is not the fact, we could point out that in a country where so many quartz veins occur as are found in this region, and as will appear from an examination of the maps and models, it is not at all strange to find quartz occurrences along the line of the alleged extension of the Black Tail vein, as it would cross into Lone Pine ground. Appellant's witnesses said there were "hundreds" and thousands of such exposures (R. pp. 229, 249). We could point out the admissions of appellant's own witnesses to the effect that there were intervals where they had tried to develop the Black Tail vein and no quartz was exposed (R. pp. 93, 94), and that in the critical workings, to-wit, the end line tunnel and the end line surface cut, these same witnesses admitted that the showing of the Black Tail vein at those points was "unusually weak" (R. p. 95), and that the alleged exposure of the vein at the end line trench was a very poor exposure (R. p. 119); that it was a "weak showing for the Black Tail vein" (R. p. 122).

We would also be able to point out that in projecting the probable extension of the Black Tail vein as found in Black Tail ground at its most northerly exposure, and attempting to correlate it with the vein exposures found in Lone Pine ground, that appellant's witnesses have arbitrarily swung the position of this vein across the intervening unexplored distance in the opposite direction from that

which it would normally occupy if we take into account the natural normal migration of the apex of the Black Tail vein down the slope. This fact was admitted by appellant's witnesses (R. pp. 116, 117, 279). We could also point out the fact that there is a vein of considerable prominence existing in a little winze to the north and back of the footwall of the Lone Pine No. 2 vein near Station 64C, as shown on Defendant's Exhibit No. 28; that this vein was directly in line of strike with another vein exposure in the Pearl tunnel, also shown on the same exhibit near point 322, and which would occupy approximately the position which the Black Tail extension would occupy normally if it extended into Lone Pine ground (R. pp. 359, 478, 219, 228, 229, 314, 283, 249). These vein exposures were absolutely ignored by appellant and appellee introduced the miner who sunk the winze near 64C, and who stated that the ore ran fifteen or eighteen dollars per ton, and that the width of the vein that they were breaking at that point was thirty inches; that it dipped to the east following down the winze and that its strike was practically at right angles to the No. 2 vein and tunnel (R. pp. 461, 462).

It is a more normal and convincing explanation of the facts to consider this faulted segment of vein crossing the Lone Pine westerly side line as the faulted extension of the main Lone Pine No. 2 vein with which it conforms in strike and values. It is just where we would expect to find such an extension. On the other hand, it is too much of a wrench

to our idea of reasonable probabilities to accept the theory that this vein of great size and carrying considerable values suddenly turns southerly almost at right angles and becomes the weak and miserable showing claimed to be the Black Tail vein crossing the south end line of the Lone Pine claim. Two years to develop this turning, which their own witnesses stated ought to be easily done in a few days, and yet the disconnected fragments and "poor showing," which their own witnesses admit is all that is exposed, is the best they can offer to sustain the heavy burden of proof the law imposes on one who seeks to invade his neighbor's territory!!

III.

TO AWARD APPELLANT THE RIGHT CLAIMED BY IT WOULD RESULT IN ALLOWING THE DEFENDANT TO FOLLOW NOT ONLY THE LONE PINE No. 2 VEIN, BUT PRACTICALLY ALL OTHER VEINS EXISTING WITHIN THE CLAIM MORE ON THEIR STRIKE THAN ON THEIR DIP.

Appellant attempts to establish the fact that in following the Lone Pine No. 2 vein into the Last Chance claim and mining on that vein, it would be following more nearly along the dip of the vein than on its strike, and in its attempt to establish this assertion calls attention to Plaintiff's Map, Exhibit 3, and the testimony of Mr. Searls, asserting that "this testimony stands undisputed" (pages 66-68, brief of appellant). An examination of that plat and of Mr. Searls' testimony will indicate that

the strike which he has taken for the Lone Pine No. 2 vein is the hypotenuse of practically a right triangle formed by the two legs, one of which represents the Lone Pine No. 2 vein, extending easterly and westerly in Lone Pine ground, and the other represents the alleged Black Tail vein, extending northerly and southerly in Lone Pine ground, and which counsel contends is a part of the Lone Pine No. 2 vein. It will be noted in this connection that no ore has ever been taken or found within the Lone Pine claim along this alleged Black Tail leg of the triangle, as admitted by appellant's own witnesses (Record, pp. 164, 105, 247, 79, 109). All of the ore has been mined from the great Lone Pine No. 2 vein, extending at almost right angles across the side line of the Lone Pine claim, and Mr. Searls himself admitted on cross examination, when asked to give an average strike for 300 feet within the Lone Pine claim as you approach the side line, "The general strike at the side line is about north 44 degrees [east]," and in answer to the trial court's query as to whether it was about the same on both sides, he replied: "Yes, sir. It is shown by this working—these workings. There is no great diversion" (R. pp. 143-144).

The patent record shows that the direction of the end lines of the Lone Pine claim is north $81^{\circ} 23'$ east (R. p. 692). It will thus be seen that the angle formed between these two is about 37° or considerably less than a right angle, so that according to appellant's own evidence this fact is established. If

we examine the strike of the discovery vein as disclosed by the various maps and exhibits, as well as the other veins which are cross-cut by the main tunnel of the Lone Pine claim, we find that practically all of these veins will cross the side line of the Lone Pine claim more on their strike than on their dip, some of them, particularly the discovery vein, crossing nearly at right angles, so that to award appellant an extralateral right in the direction of the Last Chance claim would be contrary to the spirit of the statute, which expressly provides that veins shall be followed extralaterally on their "downward course" and not on their onward course. On this point see the case of *Stewart Mining Co. v. Ontario Mining Co.*, 237 U. S. 350. Also see the same case below (Idaho), 132 Pac. 787, 792. *Stewart Mining Co. v. Bourne*, 218 Fed. 327, the latter case having been decided by this court.

Counsel cite certain Federal cases found in 131 Fed. (pages 68-69 of appellant's brief), in support of their contention that the angle at which the end lines are laid across the lode does not affect the right to follow the vein extralaterally. It is rather interesting to note that one of the distinguished counsel for plaintiff at one time urged before the various courts, and particularly before the Supreme Court of the United States, that these authorities which he now cites in the "Brief of Appellant" were not controlling on this point, since it was not essential to the decision in those cases referred to that the court should have expressed an opinion on the question.

And he further points out in that same brief that if those cases are analyzed, it will be found the extralateral rights there asserted, including that of the San Carlos, were not attempted to be exercised more along the strike than the dip.

We do not feel that it will be essential for this court to pass upon this point, but simply point out what would occur if appellant's contentions should prevail.

Erroneous statements in brief of appellant.

During the course of the preceding argument we have replied to the principal matters discussed in appellant's brief. There are, however, certain specific statements contained in the brief which we cannot permit to pass unchallenged.

On page 28 counsel criticise Mr. Creasor's testimony as to his conception of the direction of the discovery and other parallel veins. Opposing counsel say that "his testimony is unbelievable and is clearly false". They argue that no one could have known at that time that these various veins ran crosswise instead of lengthwise of the claim. It is quite evident from the maps and the reading of the testimony as a whole that these veins, one after the other, do actually outcrop, crossing the claim instead of extending lengthwise through it.

Counsel on page 29 urge that the difficulty which they allege plaintiff experienced in tracing of the apex of the discovery vein across the side lines indi-

cates this fact. Their criticism is most unfair. In the early stages of the case it was deemed sufficient to merely trench the discovery vein crosswise at intervals, and these exposures were considered satisfactory until immediately prior to the trial, one of the principal witnesses for appellee insisted that a complete exposure of the apex of the discovery vein should be made from side line to side line. Plaintiff experienced no greater difficulty than is encountered in a great majority of cases in tracing vein exposures, in "stripping" or exposing the apex of this vein until it was established to have practical physical continuity, extending from one side to the other of the Lone Pine claim.

We cannot refrain from commenting on the language used by counsel on page 34, to the effect that a certain statement made by the trial court in its opinion that the Lone Pine No. 2 vein so far as then known extended crosswise of the Lone Pine claim "is not supported by a single scintilla of evidence". This is rather a sweeping charge to make, especially in view of the eminent ability and learning of the District Judge criticized.

We have already in this brief pointed out the fact that Mr. Robbins, who was one of the locators and who for years was familiar with every detail of the early development of the claim being manager and in control of operations of the Lone Pine, testified that there was no exposure of a north and south vein anywhere within the Lone Pine claim until after the patent had issued. The patent issued

March 2nd, 1899, and it was not until 1900 that the north and south vein exposure south of the gully near the southerly end line of the Lone Pine claim was uncovered in some excavation work that was being done there at that time (R. pp. 403-404, 412). We have also called attention to the fact that at the time of the patent survey the No. 1 tunnel was in 150 feet and had crosscut the Lone Pine No. 2 ^{vein} claim, disclosing beyond question that it extended at right angles to the direction of that tunnel, and therefore at right angles to the side lines, which are substantially parallel to the course of the tunnel.

We have also called attention to the fact that the croppings of the Lone Pine No. 2 claim were exposed along the surface for some 100 feet or more in an easterly and westerly direction. We have also pointed out the fact that in 1899 Mr. Ralston, one of appellant's own witnesses, prepared a map of the Lone Pine claim, and every vein portrayed on that map is a cross vein, there being no intimation or suggestion that any north or south vein was known at that time. A consideration of this testimony makes counsel's unjust charge all the more remarkable for the evidence overwhelmingly supports the trial court's statement.

Counsel again permit themselves to fall into the same error, for on page 36 of their brief they say of another statement of the trial court in its opinion, to the effect that the locators knew that the discovery vein on the Lone Pine crossed the side lines, that "this statement is unsupported by any evi-

dence". It is so apparent that counsel's assertion is erroneous that it is hardly necessary to discuss the matter.

An examination of the testimony of the witnesses who described the discovery vein will indicate that it outcropped conspicuously. On this point Mr. Creasor testified, referring to the time of discovery on Lone Pine:

"Q. Did you at that time actually know which way the vein ran?

A. Yes, sir; certainly; they showed as plain as anything could be, every one of them at the top of the hill."

(R. p. 427.)

If it were worth taking up the time of the court, we could point out additional evidence to corroborate this, but what we have stated is sufficient to show that counsel's sweeping assertion is unjustified. That this statement of opposing counsel is not inadvertent is evident from the fact that they reiterate the criticism on the following page of their brief in practically the same language.

We must confess that we are profoundly surprised by their reference on page 39 to the trial judge "as a judge unfamiliar with the mining law". In view of the fact that one of the writers of this brief has participated in the trial of mining cases involving extralateral rights which Judge Rudkin has decided and which decisions have been reviewed by this court on appeal, and affirmed, we cannot help but feel that this unjustified criticism is prompted in a measure

by the adverse decision of the trial court. We are all prone to entertain the opinion that those who differ from us do so because of ignorance, but counsel are certainly not justified in this criticism in the instant case.

Again, on page 45 counsel refer to the fact that the president of the plaintiff company testified that he drove the 300 and 400 levels out as crosscuts and failed to find any vein in these workings. As a matter of fact, the 300 level was not driven by Mr. Day or under his direction, but Mr. Wiley testified to the exposure of a pronounced vein not over a foot in thickness which he observed in the No. 3 level cross-cut, which lines up exactly where you would expect to find the downward extension of the vein in the winze on the No. 2 level where the north and south vein is exposed (R. p. 501). Mr. Lakes also testified to this same exposure (R. p. 367).

Moral equities.

There is always an atmosphere surrounding a case, which, while perhaps it may not be determinative of the problems involved, adds additional weight to the conclusions of the trial court. The trial court by reason of its opportunity to personally observe the witnesses and everything that is done and said in the trial court, occupies a position of advantage in this respect. In the case at bar the parties had assumed for over twenty years following the location of the Lone Pine and Last Chance claims that the Lone Pine claim had no extralateral rights be-

neath the Last Chance. It was only a year prior to the trial of the case that Mr. Ralston, one of appellant's witnesses, had suddenly changed his mind and decided that instead of being a cross vein within the Lone Pine claim, that the main Lone Pine No. 2 vein turned at right angles and passed out through the southerly side lines (R. p. 203).

The president of the appellant company, also had this same idea until just prior to the filing of suit, when he had developed what in his estimation gave him a cause of action against the Last Chance owner (R. p. 159). In other words, it took nearly a quarter of a century to develop this case. As the trial court said in its opinion, after giving the reasons for the decision:

“I reach this conclusion with the less hesitation because it leaves both parties in the full possession and enjoyment of all rights claimed by them and their predecessors in interest for more than twenty years after the location of their respective claims.”

(R. pp. 46-7.)

It should also be borne in mind that this action was brought by appellant after it had attempted to lease appellee's mine in order to obtain the ore in controversy for smelting purposes, and had failed to effect the lease or get appellee to ship to appellant's smelter (R. p. 416).

These factors are not determinative of the issues here involved, but, as the Supreme Court of the United States has said under somewhat similar cir-

cumstances, they furnish "a strong argument" in support of an otherwise just determination."

Burden of proof.

It is, of course, unnecessary for us to do more than call to this court's attention the heavy burden which rests upon appellant in this case where it is seeking to invade its neighbor's sub-surface. The courts are so unanimous in their conclusion that the extralateral claimant, under such circumstances, has the "laboring oar" throughout and that upon him rests the heavy burden of establishing his contentions by "clear and satisfactory evidence", that citation of authority is unnecessary. In this case appellant is also met by the additional presumption where a great vein, twenty or more feet in width, in many places carrying practically continuous ore bodies, crosses the side line of the Lone Pine claim, and extends for several hundred feet within the Lone Pine claim, aimed directly at the opposite side line, that in the absence of convincing evidence to the contrary it is presumed to cross this other side line.

"Where a vein crosses a side line and extends across rather than along a claim for any considerable distance, the inference to be drawn is that it intersects the other side line rather than an end line."

Bourne v. Federal Mining & Smelting Co.,
243 Fed. 466, 469.

It will be observed that in the case at bar the presumption that a vein extends lengthwise of the claim

has been overcome, at least as far as this vein is concerned, by the fact that it admittedly crosses the side line and continues on within the claim, crossing it for several hundred feet in the same direction to the point where the stopes are terminated by a faulting.

We have commented on the fact that to overcome this, appellant has taken a number of comparatively small scattered exposures of quartz extending at right angles to the course of this great vein, and has endeavored to carry these exposures by connecting them up at intervals across the southerly end line of the Lone Pine claim. This has been done in the face of the fact that appellant's own witnesses had testified to the fact that there were "hundreds" and even "thousands" of quartz veins having this general direction within the territory in controversy (R. pp. 229, 249).

No wonder that this testimony was not convincing, for while the trial judge felt that it was unnecessary for him to decide the physical problem as to whether this vein did occupy the position alleged by plaintiff, yet, in commenting on this testimony, he expressed grave doubt as to this theory. In commenting on this right angle turning and the alleged crossing of the south end line, he said, "if indeed that fact can be said to be established at this time" (R. p. 44; 271 Fed. 112). At the end of the opinion he refers again to these "debatable questions", indicating that his own mind was not convinced on this point (R. p. 46; 271 Fed. 113).

Appellant certainly has not met the burden of proof contemplated by law. As was said by the Supreme Court of Idaho:

"Where the evidence is doubtful and uncertain, the court ought to decline its aid to one who is invoking its decree in order to enable him to pass beyond his own side lines and remove ore bodies from beneath the location of another."

Stewart M. Co. v. Ontario M. Co., 132 Pac. 787, 794.

To recapitulate, the contention of opposing counsel that there can be more than one discovery vein within the Lone Pine claim, is in conflict with the allegations of their original bill of complaint. It is absolutely inconsistent with the location notice, the patent plat and field notes, and the patent itself. It is contrary to the letter and spirit of the fundamental statute upon which their rights are based. There can be but one discovery vein in the Lone Pine claim, and that vein admittedly crosses both side lines. This in itself is sufficient to destroy the possibility of any assertion of rights such as plaintiff claims. Appellant seeks to acquire rights which, if granted, would inevitably mean that it could follow more on the strike than on the dip of virtually all of the veins existing in the Lone Pine claim which lie parallel to each other, striking across its easterly side line. This asserted right is in direct violation of the statute, which grants the right to follow veins on their "downward course", and not on their "onward course".

We also respectfully urge that appellant has failed to sustain the burden of proof involved in its theory that the Lone Pine No. 2 vein turns at right angles and becomes the weak and insignificant Black Tail vein alleged to exist in the southern portion of the Lone Pine claim. Inevitably under both aspects of the case the decree of the District Court was correct.

Dated, San Francisco,

October 17, 1921.

Respectfully submitted,

WM. E. COLBY,

FRED S. DUGGAN,

Attorneys for Appellee.



United States
Circuit Court of Appeals

For the Ninth Circuit.

**ERNA KORN and MUTUAL SECURITIES
COMPANY, a Corporation,**

Appellants,

vs.

**SPOKANE & EASTERN TRUST COMPANY, a
Corporation, THE B. SCHADE BREWING
COMPANY, a Corporation, B. SCHADE
and L. B. STRITESKY,**

Appellees.

Transcript of Record.

**Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.**

FILED
JUL - 2 1921
F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals

For the Ninth Circuit.

ERNA KORN and MUTUAL SECURITIES
COMPANY, a Corporation,

Appellants,

vs.

SPOKANE & EASTERN TRUST COMPANY, a
Corporation, THE B. SCHADE BREWING
COMPANY, a Corporation, B. SCHADE
and L. B. STRITESKY,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer of Spokane & Eastern Trust Company.	24
Assignments of Error.....	103
Bill of Complaint.....	2
Bond on Appeal.....	108
Certificate of Clerk U. S. District Court to Transcript of Record.....	115
Citation	111
Decree of Dismissal.....	47
Demurrer	22
EXHIBITS:	

Exhibit "A" Attached to Bill of Com- plaint—Agreement Dated January 24, 1918, Between Spokane & Eastern Trust Company and B. Schade Brewing Com- pany	13
Plaintiff's Exhibit No. 1—Stipulation in Re Testimony of Erna Korn.....	116
Plaintiff's Exhibit No. 2—Notice of Pend- ency of Action in Cause Entitled Erna Korn vs. Spokane & Eastern Trust Company et al.....	118
Plaintiff's Exhibit No. 3—Stipulation in Re Sale of Machinery, Tools, etc., to A. E. Edwards.	122

Index.

Page

EXHIBITS—Continued:

Plaintiff's Exhibit No. 4—Amended Complaint in Cause Entitled State Finance Company vs. B. Schade Brewing Company et al.....	124
Plaintiff's Exhibit No. 5—Answer of B. Schade and Sophia Schade in Cause Entitled State Finance Company vs. B. Schade Brewing Company et al.....	146
Plaintiff's Exhibit No. 6—Answer of B. Schade Brewing Company in Cause Entitled State Finance Company vs. B. Schade Brewing Company et al.....	153
Plaintiff's Exhibit No. 7—List and Description of Machinery of B. Schade Brewing Company.....	159
Plaintiff's Exhibit No. 9—Notice to Stockholders of B. Schade Brewing Company, Containing Statement of Account With the Spokane and Eastern Trust Company, Dated August 25, 1919.....	165
Defendants' Exhibit No. 10—Letter Dated September 24, 1917, B. Schade Brewing Company to Spokane Eastern Trust Company.....	170
Defendants' Exhibit No. 11—Letter Dated May 31, 1918, B. Schade Brewing Company to Spokane Eastern Trust.....	172
Defendants' Exhibit No. 12—Order for Dismissal in Cause Entitled State	

Index.

Page

EXHIBITS—Continued:

Finance Company vs. B. Schade Brew- ing Company et al.	175
Memorandum	43
Names and Addresses of Solicitors of Record..	1
Notice of Lodgment of Statement of Facts and Time and Place of Motion for Approval..	48
Notice of Presentation of Petition to Intervene.	33
Opinion	38
Order Approving Statement of Facts.....	49
Order to Take Bill as Confessed.....	32
Petition for Appeal	101
Petition to Intervene	34
Plaintiff's and Intervenor's Praecipe for Tran- script	112
Praecipe for Transcript	112
Statement of Facts	51
Stipulation Fixing Time to Serve Answer.....	23
Subpoena Ad Respondendum	20

TESTIMONY ON BEHALF OF PLAIN-
TIF:

ELMENDORF, FREDERICK	65
Cross-examination	66
HEGE, S. E.	67
Cross-examination	67
JONES, CALEB	100
LAND, JOHN	73
Cross-examination	74
MALMGREN, K. G.	70
Cross-examination	70

	Index.	Page
TESTIMONY ON BEHALF OF PLAIN-		
TIFF—Continued:		
Redirect Examination		71
SCHADE, KURT J.		71
Cross-examination		73
STRITESKY, L. R.		52
Cross-examination		57
Redirect Examination		64
Recalled		68
Cross-examination		69
TESTIMONY ON BEHALF OF DEFEND-		
ANTS:		
COLBURN, GEORGE M.		89
Cross-examination		90
EDGE, LESTER P.		77
Cross-examination		79
Redirect Examination		80
GERAGHTY, J. M.		96
Cross-examination		97
JONES, A. D.		86
Cross-examination		87
MALOTT, CONNOR		91
Cross-examination		94
Redirect Examination		95
Recalled		98
MERRYWEATHER, WALTER G.		83
Cross-examination		85
MOORE, O. C.		75
Cross-examination		76
SCHADE, SOPHIA		80
Recalled		99
Cross-examination		99

Names and Addresses of Solicitors of Record.

CALEB JONES,

Solicitor for Complainant,

Paulsen Building, Spokane, Washington.

GRAVES, KIZER & GRAVES,

Solicitors for Defendant, S. & E. Trust Co.,
Old National Bank Bldg., Spokane,
Washington.

POST, RUSSELL & HIGGINS,

Solicitors for Intervenor Mutual Securities
Company,

Exchange National Bank Bldg., Spokane, Wash.

MERRITT, LANTRY & MERRITT,

Solicitors for Intervenor M. H. Eggleston,
Old National Bank Bldg., Spokane,
Washington.

A. G. AVERY,

Solicitor for A. G. Avery, as Executor of
the Last Will and Testament of Robert
Morrill, Deceased,

Peyton Building, Spokane, Washington. [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Eastern
District of Washington, Northern Division.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE and L. R. STRITESKY,
Defendants.

Bill of Complaint.

To the Judge of the District Court of the United
States, *the* Eastern District of Washington,
Northern Division:

That Erna Korn, a citizen of the State of New
York, residing at 752 Prospect Avenue, New York
City, New York, humbly complains of the Spokane
& Eastern Trust Company, a corporation organized
and existing under and by virtue of the laws of the
State of Washington, and having its principal place
of business at Spokane, in said State and a citizen
and inhabitant of the said Eastern District of the
State of Washington, and of the B. Schade Brew-
ing Co., a corporation organized and existing un-
der and by virtue of the laws of the State of Wash-
ington, and having its principal place of business at
Spokane, in said state, and a citizen and inhabitant
of the said Eastern District of the State of Wash-
ington, and B. Schade and L. R. Stritesky, citizens
and residents of the State of Washington and the

Eastern District thereof, residing at Spokane, Washington.

Plaintiff complaining on the behalf of herself and all other stockholders in said The B. Schade Brewing Company, who shall come in due time and seek relief by contributing to the expenses of this action, shows to this Court:

I.

This is a suit of civil nature and the matters in dispute between the plaintiff and the defendants exceed the sum or value of Three Thousand Dollars, exclusive of interest and costs, [2] and as the plaintiffs have been informed and believe, and therefore aver, of the value of more than Two *Thousand* Fifty Thousand Dollars (\$250,000.00).

II.

That the plaintiff Erna Korn is now and has been for more than ten years last past, a citizen and resident of the State of New York.

III.

That the defendant, Spokane & Eastern Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of Washington, having its principal place of business at Spokane in said state, and is a citizen and inhabitant of the said Northern Division of the Eastern District of the said State of Washington.

IV.

That the defendant The B. Schade Brewing Company is a corporation organized and existing under and by virtue of the laws of the state of Washington, with its principal place of business at Spo-

kane, in said state, and is a citizen and inhabitant of the said Northern Division of the said Eastern District of the State of Washington; that said corporation was organized in March, 1903, with a capital stock of One Hundred Fifty Thousand Dollars (\$150,000), and again in April, 1907, to Seven Hundred Fifty Thousand Dollars (\$750,000); that the present capital stock of said company is divided into seventy-five hundred (7500) shares of the par value of One Hundred Dollars (\$100.00) each; that there is now outstanding five thousand (5000) shares of said capital stock; that said corporation has a Board of three trustees and since April, 1907, Sophia Schade, the defendant B. Schade and L. R. Stritesky, have constituted the Board of Trustees of the said The B. Schade Brewing Company; that the objects of said company as stated in its Articles of Incorporation are as follows, to wit: [3]

“To brew, manufacture and sell beer and to carry on and conduct a general brewing and malting business and to purchase all materials that may be necessary for the purpose of carrying on and conducting a general brewing and malting business, also to acquire purchase and sell real estate as well as personal property of every nature and kind for the purpose of carrying on and conducting a general brewing and malting and bottling business, also to build and erect breweries, malt houses and bottling works in any part of the States of Washington, Idaho, Oregon, California and Montana and to purchase all things necessary and proper for

the purpose of carrying out of the objects of this corporation or any of them''; that said corporation was to continue its existence for a period of fifty (50) years.

V.

That the defendant B. Schade is now and has been the president of the said The B. Schade Brewing Company from the date of its organization and the said L. R. Stritesky its secretary during the same period of time.

VI.

That ever since the 23d day of August, 1907, plaintiff has been a stockholder of the said The B. Schade Brewing Company, to the extent of fifty (50) shares of its capital stock of the par value of One Hundred Dollars (\$100.00) per share and holds certificate No. 34 of said shares of stock, dated August 23, 1907, and is the owner thereof; that in pursuance of the objects of its organization, the said The B. Schade Brewing Company, purchased the real property hereinafter described for a consideration of [4] approximately One Hundred Thousand Dollars (\$100,000) and that the said The B. Schade Brewing Company thereafter expended in building on said property, approximately the sum of Two Hundred Fifty Thousand Dollars (\$250,000) and for the installation of machinery and equipment therein an additional sum of approximately One Hundred Thousand Dollars (\$100,000); and during all the time herein mentioned used the same in the active prosecution of the objects of its organization; all of which prop-

erty is mentioned and more particularly described hereinafter, in that certain alleged conveyance to the said defendant the Spokane & Eastern Trust Company; that said property is at the present time reasonably worth the sum of Three Hundred Fifty Thousand Dollars (\$350,000); that said property constitutes practically all of the property holdings of the said The B. Schade Brewing Company, and was all essential and necessary for carrying into effect and execution the objects of its said corporate organization and without it the active life of said corporation is suspended.

VII.

That on or about the 24th day of January, 1918, the defendant B. Schade was the president and the defendant L. R. Stritesky was the secretary, and they together with Sophia Schade, wife of the said B. Schade, constituted the board of trustees of the said The B. Schade Brewing Company, and the said Schades owned and had control of a majority of the shares of its capital stock, and exercised arbitrary control over the affairs and management of said company, and still are such officers, and still continue to exercise such ownership and control, with absolute disregard of the rights of the minority stockholders thereof. That while acting as such officers, said defendants B. Schade and L. R. Stritesky purporting to act in behalf of the said corporation and in violation of the rights of the plaintiff and all other minority stockholders and without previous authorization of either the board of trustees or the stockholders of said company and

in transgression [5] of its charter provisions, and with the intent and for the purpose of making and securing certain personal advantages over the other stockholders, conveyed all the said property of the said The B. Schade Brewing Company to the said Spokane & Eastern Trust Company by that certain Warranty Deed, which has been duly recorded in Book 355 of Deeds, at page 599 of the Records of Spokane County, State of Washington; that said property was therein described as follows, to wit:

“Block Sixteen (16) and Seventeen (17) of Resurvey of the Second Addition to Third Addition to Railroad Addition to Spokane in Spokane County, Washington, as per plat thereof recorded in Book ‘C’ of Plats, on page 79, in the office of the Auditor of said County, also that part of Ferry Street, vacated, more particularly described as follows, to wit: Beginning on the Northwest corner of Lot Twelve (12) in Block Seventeen (17) of Resurvey of Second Addition to Third Addition to Railroad Addition; thence running Easterly and along the Southerly side of Ferry Street to the Northeast Corner of Lot One (1) in Block Seventeen (17) of said Addition; running thence Northerly to a point eighty (80) feet; thence running Westerly and along the North side of Ferry Street to the Southwest corner of Lot Four (4) in Block Sixteen (16) of said Addition; thence in a Southwesterly direction and along Sheridan Street to the Northwestern corner of said

Lot Twelve (12) in said Block Sixteen (16), being the place of beginning.”

“Also that part of the vacated alley in said Block Seventeen (17), more particularly described as follows, to wit; Beginning on the Northwest corner of Lot Thirteen (13) in Block Seventeen (17) of Second Addition to Railroad Addition to Spokane, running thence East and along the Southerly side of said alley to the Northeast corner of Lot Thirty (30) of said Block Seventeen (17) and to the Westside of Hatch Street; running thence North along the Westside of Hatch Street Fifteen (15) feet to a point, thence running West along the Northerly side of said alley to the Southwest corner of Lot Twelve (12) in said Block Seventeen (17) of said Addition; running thence South and along the East side of Sheridan Street, Fifteen (15) feet to the place of beginning”; [6]

“Excepting from the above described premises the property appropriated by the Spokane Terminal Company, a corporation, by decree dated September 7, 1905, entered in Journal 93 on page 81, and recorded in the Auditor’s office in Book 166 of Deeds on page 156, and excepting from the above described premises the property appropriated by the Northern Pacific Railway Company, by decree, dated November 7, 1905, recorded in Journal 93, Page 202, and recorded in the office of the Auditor of Spokane County, in Book 165 of Deeds on page 421.”

“And including as far as they now are or may hereafter belong to or be used with the building on the said premises, all elevators, heating and ventilating apparatus, all gas, electric light and other fixtures, and all machinery and mechanical appliances of every kind and character, now or hereafter placed in the brewing and bottling plants of said grantor, with all other fixtures and appliances therein used as a part of said brewing and bottling plants, together with all privileges, hereditaments and appurtenances, thereunto now or hereafter belonging or otherwise appertaining, and the rents, issues and profits arising therefrom; it being the intention of the grantor to convey hereby the lands above described, with the brewing and bottling plants thereon, with the trade fixtures and appliances therein contained, as an entirety.”

VIII.

That contemporaneous with the execution and delivery of said Warranty Deed aforementioned, the defendant Spokane & Eastern Trust Company, a corporation, as party of the first part entered into that certain agreement with the defendant The B. Schade Brewing Company, as party of the second part, a copy of which is hereto attached, marked Plaintiff's Exhibit “A” and made a part hereof which was calculated to and did secure to the defendant B. Schade and to Sophia Schade, his wife, the right to the individual use of said property for a year and 6 months, without rental, and they were

released from all personal liability by reason of their having signed certain notes sued upon by the State Finance Company; that said concessions were made to the said B. Schade and wife as an inducement or consideration for his execution of that certain deed of conveyance mentioned in the preceding paragraph. [7]

IX.

That during all the time herein mentioned, the plaintiff has resided at New York City, New York, and had no notice or intimation of whatsoever kind, of the execution of the foregoing mentioned conveyance or agreement and never consented or assented to any such acts, or became cognizant of their performance until on or about the first day of June, 1919, when the plaintiff was informed of the same by the said B. Schade; that thereafter plaintiff employed counsel, and as she is informed and believes, and therefore avers, that on or about July 15, 1919, said counsel on her behalf, made demand upon said The B. Schade Brewing Company, and its said managing officers and trustees, to bring or cause to be brought an action against the defendant Spokane & Eastern Trust Company, to set aside as illegal and void said warranty deed and agreement; and the said The B. Schade Brewing Company and its officers refused to bring any such action, or take any steps for an avoidance of disaffirmance of said deed and agreement. That the said B. Schade and Sophia Schade, his wife, are still in possession and charge of said property. That the plaintiff was a shareholder, as aforesaid, at the time of the trans-

actions complained of, and this suit is not a collusive one to confer on this court jurisdiction of which it would not otherwise have cognizance. That the acts complained of are fully executed and completed, and as plaintiff is informed and believes and therefore avers, beyond the power of the said The B. Schade Brewing Company, or its managing officers, to have said deed and agreement set aside without a resort to a court of equity.

X.

That the plaintiff is remediless at law and the exercise of the equitable powers of this Court are necessary to redress plaintiff's wrongs and injuries aforesaid in the conveying of all of the property of the said The B. Schade Brewing Company and the suspension of its corporate life, contrary to the statutes in [8] such cases made and provided, and in violation of the rights and privileges of the plaintiff.

And to the end that the said Spokane & Eastern Trust Company, The B. Schade Brewing Company, B. Schade and L. R. Stritesky, defendants, by full, true, direct and certain answers made according to their knowledge, information and belief, to all and singular the matters and charges aforesaid, but not under oath, their answers on oath being expressly waived, plaintiff prays as follows:

1. That the said conveyance or deed by the said The B. Schade Brewing Company to the said Spokane & Eastern Trust Co. and the said agreement between the same parties be set aside as illegal and inequitable and the same be declared null and void,

and the said property therein mentioned be returned to said repossessed by the said The B. Schade Brewing Company, subject to the rights of its creditors and stockholders.

2. That the plaintiff have such other and further relief that to this Court may seem meet and proper, together with a reasonable attorney's fee for plaintiff's attorney and all other costs in this action.

3. May it please your Honor to grant the plaintiff the right to subpoena issuing out of and under the seal of this Honorable Court, directed to the said Spokane & Eastern Trust Co., a corporation, and to the said The B. Schade Brewing Company, a corporation, and to the said B. Schade and R. L. Stritesky, commanding each of them by a certain day and under certain penalty to be therein inserted, to be and appear before this Honorable Court, and then and there to answer the premises and to further stand and abide by such order and decree therein as shall be agreeable to equity and good conscience; and plaintiff will ever pray.

CALEB JONES,

Solicitor for Plaintiff.

Postoffice Address: 620 Paulsen Bldg., Spokane,
Washington. [9]

State of New York,
County of Bronx,—ss.

Personally appeared before me, the undersigned authority, Erna Korn, the plaintiff in the above cause, who being duly sworn as to the truth of the allegations made in the above bill, says that she has read the foregoing bill and knows the contents

thereof and the same is true of her own knowledge except as to matters therein stated on information and belief, and as to those matters she believes them to be true.

ERNA KORN.

Subscribed and sworn to before me this 11th day of August, 1919.

EDWARD A. ACKER,

Notary Public in and for the State of New York,
Residing at Bronx County, 77 Forest Ave.,
New York City. [10]

Exhibit "A."

L. R. S.

AGREEMENT.

THIS AGREEMENT made and entered into this 24th day of January, 1918, by and between the Spokane & Eastern Trust Company, a corporation, party of the first part, and the B. Schade Brewing Company, a corporation, party of the second part:

WHEREAS, said first party has been heretofore the owner of a mortgage of date October 5, 1914, upon the following described real estate and personal property, to wit:

Blocks Sixteen (16) and Seventeen (17) of Resurvey of the Second Addition to Third Addition to Railroad Addition to Spokane, in Spokane County, Washington, as per plat thereof recorded in Book 'C' of Plats on page 79, in the office of the Auditor of said County, also that part of Ferry Street, vacated, more particularly described as follows, to wit: Beginning on

the Northwest Corner of Lot Twelve (12) in Block Seventeen (17) of Resurvey of Second Addition to Third Addition to Railroad Addition; thence running Easterly and along the Southerly side of Ferry Street to the Northeast Corner of Lot One (1), in Block Seventeen (17) of said Addition; running thence Northerly to a point eighty (80) feet; thence running Westerly and along the North Side of Ferry Street to the Southwest Corner of Lot Four (4) in Block Sixteen (16) of said Addition; thence in a Southwesterly direction and along Sheridan Street to the Northwestern Corner of said Lot Twelve (12) in said Block Sixteen (16), being the place of beginning.

Also that part of the vacated alley in said block Seventeen (17), more particularly described as follows, to wit: Beginning on the Northwest Corner of Lot Thirteen (13) in Block Seventeen (17) of Second Addition to Third Addition to Railroad Addition to Spokane, running thence East and along the Southerly side of said alley to the Northeast corner of Lot Thirty (30) of said Block Seventeen (17) and to the West side of Hatch Street running thence North along the West side of Hatch Street; Fifteen feet to a point, thence running West along the Northerly Side of said alley to the Southwest Corner of Lot Twelve (12) in said Block Seventeen (17) of said addition; running thence South and along the East side of Sheridan Street, Fifteen (15) feet to the place of beginning.

Excepting from the above-described premises the property appropriated by the Spokane Terminal Company, a corporation, by decree dated September 7, 1905, entered in Journal 93 on page 81 and recorded in the Auditor's office in

L. R. S.

Book 166 of [11] of Deeds on page 156; and excepting from the above-described premises the property appropriated by the Northern Pacific Railway Company, by decree, dated November 7, 1905, recorded in Journal 93, Page 202, and recorded in the office of the Auditor of Spokane County, in Book 165 of Deeds on page 421.

And including as far as they now are or may hereafter belong to or be used with the building on the said premises, all elevators, heating and ventilating apparatus, all gas, electric lights and other fixtures, and all machinery and mechanical appliances of every kind and character, now or hereafter placed in the brewing and bottling plants of said grantor with all other fixtures and appliances therein used as a part of said brewing and bottling plants, together with all privileges, hereditaments and appurtenances thereunto now or hereafter belonging or otherwise appertaining, and the rents, issues and profits arising therefrom; it being the intention of the grantor to convey hereby the lands above described, with the brewing and bottling plants thereon, with the trade fixture and appliances therein contained, as an entirety.

which said mortgage is recorded in the office of the Auditor of Spokane County, in Book 281 of Mortgages, at page 379; and,

WHEREAS, the amount due said first party from said second party on account of said mortgage, taxes, insurance premiums, attorneys' fees and interest to January 1, 1918, is as follows, to wit:

Principal notes.....\$50,000.00

With interest at 8% from July 3, 1916, to

January 1, 1918..... 5,997.78

Delinquent tax certificate..... 5,485.45

Interest thereon at 8% from Nov. 9, 1917,

to January 1, 1918..... 62.17

Insurance..... 486.05

Interest thereon at 8% from Nov. 16,

1917, to January 1, 1918..... 4.75

January 1, 1918, insurance..... 237.50

Personal property taxes paid on account

of certificate of delinquency..... 126.31

Attorneys' fees..... 1,250.00

Total.....\$63,650.01

AND WHEREAS, said second party has heretofore caused to be conveyed to said first party, by conveyances which are agreed to be absolute and indefeasible, all of the real estate, personal property, rights and privileges described in said mortgage, in full settlement of its indebtedness to said first party, which said indebtedness it is agreed on

L. R. S.

January 1, 1918, [12] amounts to the sum of \$63,650.01; and,

WHEREAS, said second party desires an option to purchase from said party the property hereinbefore conveyed;

NOW, THEREFORE, this agreement WITNESSETH:

1. In consideration of the conveyance to it of the property above described and of the covenants and agreements hereinafter contained, said first party hereby grants to said second party an option to purchase said above-described real estate and personal property until July 1, 1919. The purchase price of said property under said option to be the sum of \$63,650.01, together with interest thereon from January 1, 1918, until said option is exercised and said purchase price is paid, at the rate of 7% per annum, together with such sums as said first party shall pay during the life of this option on account of insurance premiums, taxes, assessments, revenue stamp expenses, abstracting expense necessary to show clear title in said first party, and any other expenses necessary or proper in the maintenance or preservation of the property herein described, with interest on each of said sums from the date of payment until the date said purchase price is paid, at the rate of 7% per annum. Receipts from the payment of such additional amounts to be conclusive between the parties to this agreement of the amount, validity and fact of the payment thereof.

2. Second party shall have the right to enter into and upon said premises during the life of this option for the purpose of inspection or showing the same to prospective purchasers, and shall have and

retain a key to the buildings for this purpose, and the parties hereto shall co-operate together in good faith for the purpose of securing a satisfactory purchaser for said premises.

3. IT IS UNDERSTOOD AND AGREED that all income derived from said premises during the life of this option shall be paid to and received by first party, who shall credit the same on account of this option and shall charge against this option all

L. R. S.

[13] moneys paid on account of taxes, insurance, revenue stamp expenses, abstracting expenses, and all other expenses necessary and proper therein, and in the event said option is exercised an accounting shall be had between said parties and said first party shall be paid whatever balance shall be due on account of the purchase price of said premises.

4. IT IS UNDERSTOOD AND AGREED that the fixtures and personal property described herein may be sold in whole or in part for such price and on such terms as shall be agreeable to both parties hereto. First party shall have the right to lease said premises, but no lease so given shall interfere with the rights of said second party and shall terminate on the exercise of this option. No alterations shall be made in the buildings and no fixtures, appliances or machinery shall be removed therefrom without the consent of both parties, during the period of this option.

5. IT IS FURTHER UNDERSTOOD AND AGREED that if during the lifetime of this option said second party desires to conduct in the bottling

works on said premises a business of its own, or if B. Schade or Sophia Schade, his wife shall personally operate a business in said bottling works, that no rental shall be charged therefor as long as said business is conducted by the said Schades personally or by said second party on its own account, but that the same shall not be leased or sublet by the Schade Company or the Schades to any other party or parties whatsoever.

6. IT IS UNDERSTOOD AND AGREED that upon the execution and recording of the deeds and bills of sale of the premises above described, vesting in said first party good title to the same, free from encumbrances excepting the mortgage hereinbefore referred to, and tax liens, and upon execution of this option and agreement, that the action pending in the Superior Court of Spokane County, entitled State Finance Company vs. B. Schade Brewing Company et al., will be dismissed, with prejudice, and without costs, and that all notes and said mortgage shall be [14] canceled and surrendered to said second party, and that no recourse shall be had as against said B. Schade or said Sophia Schade, personally, on account of signing said notes.

7. IT IS FURTHER UNDERSTOOD AND AGREED that said first party shall not cause said premises to be insured in a sum greater than that provided for in the mortgage described herein.

IN WITNESS WHEREOF, the parties to this agreement have caused the same to be executed in

duplicate the day and year first above written.

SPOKANE & EASTERN TRUST COM-
PANY.

By (Sgd.) CONNOR MALOTT,
Its Vice-president.

By (Sgd.) W. T. TRIPLETT,
Its Secretary.

B. SCHADE BREWING COMPANY.

By (Sgd.) B. SCHADE,
Its President.

[Seal] By (Sgd.) L. R. STRITESKEY.

[Endorsements]: Filed in the United States Dis-
trict Court, Eastern District of Washington. Au-
gust 16, 1919. W. H. Hare, Clerk. By H. J. Dun-
ham, Deputy. [15]

UNITED STATES OF AMERICA.

District Court of the United States, Eastern Dis-
trict of Washington, Northern Division.

IN EQUITY.

Subpoena ad Respondendum.

The President of the United States of America,
GREETING: To Spokane & Eastern Trust
Co., The B. Schade Brewing Co., B. Schade, L.
R. Stritesky.

YOU ARE HEREBY COMMANDED, that you
be and appear in said District Court of the United
States aforesaid, at the courtroom, of said court, in
the city of Spokane, twenty days from the issuing
thereof, to answer a bill of complaint filed against

you in said court by Erna Korn, citizen of the State of New York, and to do and receive what the Court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

WITNESS, the Honorable FRANK H. RUDKIN, Judge of the United States District Court for the Eastern District of Washington, and the seal of said District Court this 16th day of August, 1919.

W. H. HARE,
Clerk.

By _____,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 13,
SUPREME COURT U. S.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above mentioned suit on or before the 20th day after service, excluding the day thereof, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

W. H. HARE,
Clerk.

By _____,
Deputy Clerk. [16]

United States of America,
Eastern District of Washington,—ss.

I hereby certify, that I served the within writ by delivering to and leaving a true copy thereof with Schade Brewing Company by serving B. Schade, as president, and served B. Schade, personally, and served a copy on Spokane & Eastern Trust Co., by

serving R. Lewis Rutter, as president, and served a copy on L. R. Stritsky, at Spokane, Wash.

Fees, 8.18.

August, 16th, 1919.

J. E. McGOVERN,
United States Marshal.
By J. W. Dennison,
Deputy.

[Endorsed]: No. 3281. United States District Court, Eastern District of Washington. In Equity. Erna Korn vs. Spokane & Eastern Trust Co. et al. Subpoena. Filed in the U. S. District Court, Eastern Dist. of Wash. Aug. 18, 1919. W. H. Hare, Clerk. By H. J. Dunham, Deputy.

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE and L. R. STRITESKY,
Defendants.

Demurrer.

Comes now the defendant Spokane & Eastern Trust Company and demurs to the complaint of the plaintiff for the reason that such complaint does not

state facts sufficient to constitute a cause of action against this defendant.

GRAVES, KIZER & GRAVES,
Attorneys for Defendant Spokane & Eastern Trust
Company. [17]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE and L. R. STRITESKY,
Defendants.

Stipulation Fixing Time to Serve Answer.

IT IS HEREBY STIPULATED that defendant
Spokane & Eastern Trust Company have until April
4th, 1920, within which to serve its answer in the
above-entitled cause.

Dated this 24th day of March, 1920.

CALEB JONES,
Attorney for Plaintiff.
GRAVES, KIZER & GRAVES,
Attorneys for Defendant Spokane & Eastern Trust
Company.
[Endorsements]: [18]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
B. SCHADE BREWING COMPANY,
B. SCHADE and L. R. STRITESKY,
Defendants.

Answer of Spokane & Eastern Trust Company.

For answer to the bill of complaint herein defendant Spokane & Eastern Trust Company:

I.

Admits that this bill is a suit of civil nature and that the property which is affected by the suit is of greater value than Three Thousand Dollars, exclusive of interest and costs, denies the remaining allegations of paragraph I of said bill.

II.

Avers that defendant is without knowledge concerning the allegations of paragraph II of said bill.

III.

Admits the allegations of paragraph III of said bill.

IV.

Admits the allegations of paragraph IV of said bill.

V.

Admits the allegations of paragraph V of said bill.

VI.

Admits that plaintiff is a stockholder in the B. Schade Brewing Company, as alleged in paragraph VI of the bill; admits that the B. Schade Brewing Company acquired the property affected by this suit for its corporate purposes and that such property was used for its corporate purposes during the time that such corporation was engaged in business; admits that it constituted practically all the property holdings of the B. Schade Brewing Company. [19] Admits that the property is described in the conveyance to this defendant, which is referred to in the bill; denies the remaining allegations of the said paragraph VI.

VII.

Admits that the defendants Schade and Stritesky were president and secretary of the B. Schade Brewing Company, and that they, with Sophia Schade, wife of B. Schade, constituted the board of trustees of the Brewing Company; admits that the B. Schade Brewing Company conveyed the property described in the seventh paragraph of the bill by warranty deed as alleged in said seventh paragraph; denies the remaining allegations of the seventh paragraph of said bill.

VIII.

Admits that this defendant entered into an agreement with the B. Schade Brewing Company as alleged in paragraph VIII of the bill; admits that the indebtedness described in the agreement referred to in paragraph VIII was fully satisfied and discharged by the transaction set forth therein;

denies the remaining allegations of said paragraph VIII.

IX.

Avers that this defendant is without knowledge concerning plaintiff's residence or respecting any demand she may have made upon the B. Schade Brewing Company's officers and their reply thereto; admits that plaintiff was a stockholder in the B. Schade Brewing Company at the time of the transaction and that this suit is not collusive; denies the remaining allegations contained in paragraph IX of the bill.

X.

Denies the allegations contained in paragraph X of the bill. [20]

FURTHER ANSWERING and for a FIRST AFFIRMATIVE DEFENSE to the allegations contained in the bill of complaint, defendant Spokane & Eastern Trust Company alleges:

I.

The property described in plaintiff's bill of complaint and a reconveyance of which is thereby sought was conveyed to this defendant in payment and satisfaction of an indebtedness owing to this defendant by the B. Schade Brewing Company. Such indebtedness arose from money loaned to the B. Schade Brewing Company by this defendant and its assignors, which money was used by the B. Schade Brewing Company in the conduct of its corporate business and for the benefit of the Brewing Company and of its shareholders. No part of said money has ever been repaid, nor the indebtedness in any way discharged or reduced, save by the con-

veyance of the property referred to in the bill of complaint, which conveyance was accepted in payment of such indebtedness as aforesaid. This defendant avers that it would be unjust and inequitable to decree a reconveyance of the property save upon condition that the indebtedness owing by the B. Schade Brewing Company be paid by that Company or its shareholders, and that no suit by or on behalf of the B. Schade Brewing Company or its shareholders should be entertained without an offer on its or their part to do equity by payment of such debt. Inasmuch as plaintiff has not offered to do equity herein her bill of complaint should be dismissed.

FURTHER ANSWERING and for a SECOND AFFIRMATIVE DEFENSE to the allegations of the bill of complaint, defendant Spokane & Eastern Trust Company alleges:

I.

That the plaintiff was informed of the proposed transfer of the property of the B. Schade Brewing Company to this defendant in satisfaction of indebtedness owing by the Brewing Company to this defendant, and its assignors, and made no objection thereto prior to the making of such conveyance. She stood by until the conveyance [21] was made and this defendant had satisfied and discharged the indebtedness of the B. Schade Brewing Company to it and its assignors and dismissed the suit brought to foreclose the mortgage upon the property affected hereby, which had been given to secure the payment of the indebtedness aforesaid. She stood by also

while this defendant entered into possession of such property and expended money on account thereof and in reliance upon the conveyance of the property to it, and made no objection whatsoever thereto.

WHEREFORE, this defendant says that plaintiff has been guilty of laches which debars her from relief in a court of equity.

FURTHER ANSWERING and for a THIRD AFFIRMATIVE DEFENSE to the allegations contained in the bill of complaint, the defendant Spokane & Eastern Trust Company alleges:

I.

Prior to the adoption of the act forbidding traffic in intoxicating liquors within the State of Washington the B. Schade Brewing Company was engaged in the business of manufacturing and selling beer in the city of Spokane, and in the conduct of such business acquired the property referred to in the bill of complaint and a reconveyance of which is thereby sought. In the conduct of its business it was obliged from time to time to borrow money, and prior to October 1, 1914, it had borrowed from this answering defendant and its assignors \$50,000, which money was used by the B. Schade Brewing Company in the conduct of its business and for the benefit of itself and its shareholders. On or about October 5, 1914, it executed a mortgage upon all its property to secure such indebtedness, the mortgage and indebtedness which it was given to secure being the same which is referred to in the agreement which is attached as Exhibit "A" to plaintiff's bill of complaint.

II.

Prohibition of the manufacture and sale of intoxicating liquors within the State of Washington destroyed the business of the B. Schade Brewing Company, and rendered it incapable of paying [22] its debts or of paying the taxes on its property. After some ineffectual efforts to conduct the business of manufacturing and selling soft drinks it suspended business and was without funds to pay any indebtedness or to discharge the taxes on its property. The mortgage and indebtedness it was given to secure had been assigned to the State Finance Company, a subsidiary corporation of this defendant and which thereafter acted on behalf of this defendant. The State Finance Company was required to and did make sundry disbursements on account of delinquent taxes, for insurance on the property, etc., and thereafter brought suit to foreclose such mortgage. Pending the foreclosure suit and at the solicitation and earnest request of the B. Schade Brewing Company this defendant and the B. Schade Brewing Company entered into an agreement, which is set forth as Exhibit "A" to plaintiff's bill of complaint. A conveyance of the property covered by such mortgage was made to this defendant in pursuance of the agreement aforesaid and likewise in pursuance of such agreement the mortgage of the B. Schade Brewing Company and the indebtedness it was given to secure was satisfied, canceled and discharged and the notes evidencing the indebtedness were surrendered and the pending foreclosure suit was dismissed with prejudice and

without costs. At the time of the making of such agreement and of the satisfaction of the debt and dismissal of the foreclosure suit as aforesaid, the indebtedness of the B. Schade Brewing Company was in the amount stated in Exhibit "A" aforesaid and such debt was never paid nor reduced in any other wise than by such conveyance.

III.

The B. Schade Brewing Company was without defense to the foreclosure suit aforesaid and the sole purpose of entering into the said Exhibit "A" and in doing the things which were done thereunder was to relieve the Brewing Company of the costs of the foreclosure suit and sale and from a probable deficiency judgment therein. By virtue of the option to repurchase contained in [23] said Exhibit "A," the B. Schade Brewing Company and its shareholders obtained in effect a redemption period of eighteen months instead of the one year allowed by statute had there been a sale under foreclosure. Neither the B. Schade Brewing Company nor any shareholder exercised or sought to exercise the option to repurchase contained in Exhibit "A," and after the expiration of such period, to wit, in the latter part of the year 1919, this defendant offered all the shareholders of the B. Schade Brewing Company the right to repurchase by repayment of the indebtedness of the B. Schade Brewing Company to this defendant, and offered to each shareholder the right to become a proportional owner with this defendant in the property described in Exhibit "A" by the payment by such shareholder of a part of the

indebtedness of the B. Schade Brewing Company proportioned to the number of shares in the B. Schade Brewing Company owned by each shareholder. Several of the shareholders of the B. Schade Brewing Company have accepted such offer and have paid to this defendant a portion of the indebtedness of the B. Schade Brewing Company and have thereby become proportional owners with it in the property. This offer was made to plaintiff herein but was declined by her.

WHEREFORE, having fully answered, the defendant Spokane & Eastern Trust Company prays that plaintiff's bill of complaint be dismissed and that it recover its costs from her.

SPOKANE & EASTERN TRUST COMPANY,

By GRAVES, KIZER & GRAVES,

Its Attorneys.

F. H. GRAVES,

W. G. GRAVES,

B. H. KIZER,

Solicitors for Spokane & Eastern Trust Company.

[Endorsements]: Filed in the U. S. District Court, Eastern District of Washington. March 30, 1920. Wm. H. Hare, Clerk. H. J. Dunham, Deputy. [24]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No.—.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE and L. R. STRITESKY,
Defendants,

Order to Take Bill as Confessed.

The subpoena in the above-entitled cause having been returned, which return has been filed, and it appearing therefrom that the said subpoena was duly served on The B. Schade Brewing Company, B. Schade and L. R. Stritesky, three of the defendants above named, and no answer having been filed by either of them, when answers should have been filed by each of them, on or before the 5th day of September, A. D. 1919, the same being the twentieth day after the service of the subpoena including the day of service, therefore, on motion of Caleb Jones, solicitor for the plaintiff, it is ORDERED AND DECREED that plaintiff's bill of complaint be taken as confessed as to the said The B. Schade Brewing Company, B. Schade and L. R. Stritesky, said defendants.

Dated this 5th day of April, A. D. 1920.

W. H. HARE,
Clerk.

[Endorsements]: Filed in the U. S. District Court, Eastern District of Washington. April 5, 1920. Wm. H. Hare, Clerk. H. J. Dunham, Deputy. [25]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE and L. R. STRITESKY,
Defendants.

Notice of Presentation of Petition to Intervene.

To Spokane & Eastern Trust Company and to Graves, Kizer & Graves, Your Attorneys; and to Erna Korn and Caleb Jones, Your Attorney:

You, and each of you, are hereby notified that the undersigned will present the attached petition to intervene to the above-entitled court at 10:00 o'clock A. M., on the 28th day of September, 1920, or as soon thereafter as counsel can be heard.

Dated at Spokane, Washington, this 17th day of September, 1920.

POST, RUSSELL & HIGGINS,
Attorneys for Mutual Securities Company.

MERRITT, LANTRY & MERRITT,
Attorneys for M. H. Eggleston.

A. G. AVERY,
Attorney for A. G. Avery as Executor of the Last
Will and Testament of Robert Morrill, Deceased.
[26]

In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE and L. R. STRITESKY,

Defendants.

Petition to Intervene.

Come now Mutual Securities Company, a corpora-
tion, M. H. Eggleston and A. G. Avery, as executor
of the last will and testament of Robert Morrill, de-
ceased, and petition the Honorable Court above
named, and allege as follows:

I.

That the Mutual Securities Company is a corpora-
tion organized under the laws of Minnesota and is
the owner of 155 shares of the common stock and

45 shares of preferred stock of the B. Schade Brewing Company, and has been the owner of said stock since 1913, having acquired the same from the estate of John B. De Laittre, deceased; that the said John De Laittre purchased the said stock in the year 1907, and was the owner thereof at the time of his death.

II.

That M. H. Eggleston is a resident of the City of Spokane, Washington, and is the owner of 50½ shares of the capital stock of The B. Schade Brewing Company, having acquired the same by purchase as follows: 25 shares on June 1st, 1907; 5½ shares on July 15th, 1907; and 20 shares on October 11th, 1907.

III.

That A. G. Avery, as executor of the last will and testament of Robert Morrill, deceased, is a resident of the city of Spokane, Washington, and was appointed as executor of the last [27] will and testament of Robert Morrill, deceased, in said will, and qualified as executor on June 7th, 1917, the said Robert Morrill having died on April 21st, 1917, testate, leaving a nonintervention will; that at the time of the death of the said Robert Morrill, he was the owner of 50 shares of the preferred stock and 100 shares of the common stock of The B. Schade Brewing Company, having acquired the same by purchase in 1907, and as such executor of the last will and testament of Robert Morrill, deceased, the said A. G. Avery is the owner of all of said stock.

IV.

That heretofore and on or about the 1st day of

September, 1919, the above-named plaintiff brought an action against the defendants named in the title of this cause in the above-entitled court in behalf of himself and all other stockholders of The B. Schade Brewing Company who are similarly situated and desire to contribute to the expense of this action; that the issues in said cause are made up at this time, and the case is set for trial September 17th, 1920. Reference is made to the bill of complaint of the said Erna Korn on file in the above-entitled court and cause, and also to the answer of the defendants in the above-entitled court and cause for the substance of the said bill and said answer and the nature of this proceeding, and, in addition thereto, these petitioners state that they are owners and holders of capital stock of The B. Schade Brewing Company, as set forth hereinabove, and, in order to have their claims adjudicated without a multiplicity of suits, do hereby petition this Court that they be made parties plaintiff or defendant, as may seem best to the Court in said above cause, so that their claims may be adjudicated; that they seek the same relief against the defendants named in the title of the above-entitled cause as set forth more particularly in the bill of complaint of the said plaintiff on file in this cause; that the interest of these [28] petitioners in the above litigation is identical with that of the plaintiff in the above-entitled cause, excepting as to amounts.

WHEREFORE, these petitioners pray the Court for permission to file their bill of intervention if the Court should require the same, or for permission to

join with the plaintiff Erna Korn in the above-entitled cause, as parties plaintiff or parties defendant, as the Court may direct, and that the relief sought in the original bill of complaint of the said Erna Korn be granted to these petitioners as well as to the said Erna Korn.

MUTUAL SECURITIES COMPANY,

M. H. EGGLESTON,

A. G. AVERY,

As Executor of the Last Will and Testament of Robert Morrill, Deceased.

POST, RUSSELL & HIGGINS,

Attorney for Mutual Securities Company.

MERRITT, LANTRY & MERRITT,

Attorneys for M. H. Eggleston.

A. G. AVERY,

Attorney for A. G. Avery as Executor of
the Last Will and Testament of Robert
Morrill, Deceased. [29]

State of Washington,
County of Spokane,—ss.

A. E. Russell, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the petitioners named in the foregoing petition, and makes this verification in behalf of all of said petitioners, and is authorized by them so to do; that he has read the foregoing petition, knows the contents thereof, and the same are true, as he verily believes.

A. E. RUSSELL.

Subscribed and sworn to before me this 17th day
of September, 1920.

[Seal]

[Seal] H. V. DAVIS,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash. [30]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 3281.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE and L. R. STRITESKY,
Defendants.

and

MUTUAL SECURITIES COMPANY, M. H.
EGGLESTON and A. G. AVERY, as Ex-
ecutors,

Intervenors.

Opinion.

CALEB JONES, for Plaintiff.

GRAVES, KIZER & GRAVES, for Spokane &
Eastern Trust Company.

POST, RUSSELL and HIGGINS, MERRITT,
LANTRY & MERRITT, and A. G. AVERY,
for Intervenor.

RUDKIN, District Judge.

It appears from the complaint and answer in this case that on the 5th day of October, 1914, the Brewing Company mortgaged substantially all of its property to the Trust Company to secure an indebtedness of \$50,000.00. On the 1st day of January, 1918, this indebtedness, together with interest and certain disbursements made by the mortgagee for the protection of the mortgage lien, amounted to the sum of \$63,650.01. On the 24th day of January, 1918, the Brewing Company conveyed the mortgaged property to the Trust Company in payment and satisfaction of the mortgage debt, and the Trust Company, in turn, executed an agreement whereby it agreed to reconvey the property to the Brewing Company on or before July 1, 1919, upon the payment of this indebtedness, together with interest at the rate of seven per cent per annum from January 1, 1918.

The present suit was instituted by a stockholder of the Brewing Company, in her own behalf, and on behalf of other stockholders [31] who might join and contribute to the expense, to cancel and set aside the conveyance from the Brewing Company to the Trust Company, and the agreement to reconvey from the Trust Company to the Brewing Company.

The plaintiff is a citizen of the State of New York, and the defendants citizens of this State. Three other stockholders have asked leave to intervene and to be made parties plaintiff or defendant as may to the Court seem best and pray for the same relief as does the original plaintiff. One of the intervenors

is a citizen of the State of Minnesota, and no objection to the intervention of this party is urged by either plaintiff or defendants. The other two intervenors are citizens of this state, however, and the Trust Company objects to their intervention upon the sole ground that their presence as parties will oust the court of jurisdiction. The question thus presented is by no means free from difficulty, and no case directly in point has been cited by either side. The rule is well settled that where a Federal Court acquires jurisdiction by reason of the citizenship of the parties the Court will allow third persons to intervene if necessary for the protection of their rights, without regard to their citizenship or the amount of their claims. This rule has usually been applied in creditors' suits and in suits to foreclose mortgages or other liens, where property or funds are brought within the custody of the Court. Under any other rule it would be impossible in many cases to administer trust funds or foreclose liens in a Federal Court. But there must be some limitation on this rule, and the Trust Company contends that it has no application except to the cases to which I have referred, or to cases of like character. There is much force in this contention.

It was held by Judge Pardee, in *United Electric Securities Co. vs. Louisiana Electric L. Co.*, 68 Federal, 673;

“Where jurisdiction rests upon the diverse citizenship of complainant and defendant, and, during the proceeding, a third party, who is a citizen of the same state with defendant, inter-

venes, the court will have no jurisdiction of his controversy [32] with defendant, unless the controversy between complainant and defendant is one which brings to the Court the possession and control of the defendant's property, in which the intervenor claims some interest."

In this case the only relief sought, and the only relief which the Court can grant, is a cancellation of the deed and contract. No property is brought within the custody of the Court; the Court has no property or fund to administer, and the intervenors assert no interest in or to any such property or fund. It is not at all necessary that they should be permitted to intervene for the protection of their rights. They will not be affected or bound by the decree, unless they become parties or take part in the trial. Certainly they will not be bound if the Court refused to allow them to become parties and they do not participate. On the other hand, all parties concerned express an entire willingness that these intervenors may participate as fully in the trial as though they were in fact parties, and if they do so openly they, and all other parties, to the suit will be bound by the final decree. Of course, their connection with the case will rest in parol; but even this difficulty might be removed by a stipulation providing for their taking part in the trial and that they will be bound by the result.

Inasmuch as I am of the opinion that the presence of the intervenors who are citizens of this State would render the jurisdiction of the Court doubtful, to say the least, I do not think they should be per-

mitted to intervene, where intervention is not necessary for the protection of their rights.

The petition will therefore be allowed as to the citizen of Minnesota; but disallowed as to the citizens of this State.

[Endorsements]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 7, 1920. W. H. Hare, Clerk. [33]

In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.

No. 3281.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY;
THE B. SCHADE BREWING COMPANY;
B. SCHADE and L. R. STRITESKY,

Defendants,

and

MUTUAL SECURITIES COMPANY, M. H. EG-
GLESTON and A. G. AVERY, as Executors,
Intervenors.

Memorandum.

CALEB JONES, Attorney for Plaintiff.

GRAVES, KIZER & GRAVES, for Spokane & Eastern Trust Company.

POST, RUSSELL & HIGGINS, MERRITT, LANTRY & MERRITT, and A. G. AVERY, for Intervenors.

RUDKIN, District Judge.

The issues here involved were thus stated in a former opinion.

“It appears from the complaint and answer in this case that on the 5th day of October, 1914, the Brewing Company mortgaged substantially all of its property to the Trust Company to secure an indebtedness of \$50,000.00. On the 1st day of January, 1918, this indebtedness, together with interest and certain disbursements made by the mortgagee for the protection of the mortgage lien, amounted to the sum of \$63,-650.01. On the 24th day of January, 1918, the Brewing Company conveyed the mortgaged property to the Trust Company in payment and satisfaction of the mortgage debt, and the Trust Company, in turn, executed an agreement whereby it agreed to reconvey the property to the Brewing Company on or before July 1, 1919, upon the payment of this indebtedness, together with interest at the rate of seven per cent per annum from January 1, 1918.

“The present suit was instituted by a stock-

holder of the Brewing Company, in her own behalf, and on behalf of other stockholders who might join and contribute to the expense, to cancel and set aside the conveyance from the Brewing Company to the Trust Company, and the agreement to reconvey from the Trust Company to the Brewing Company."

There is little or no controversy over the facts. The execution of the mortgage, the amount of the mortgage debt, its nonpayment, the conveyance of the mortgaged property, the agreement to reconvey, the dismissal, with prejudice, of a suit pending in the state court to foreclose the mortgage, the satisfaction of the mortgage of record, and the surrender of the notes secured by the mortgage are all conceded or proved beyond controversy. In [34] the face of these facts what, if any, remedy has either the corporation or the plaintiff and interveners as stockholders. Counsel contend that the deed and agreement to reconvey are void for two reasons. First, because *ultra vires*, and second, because of the provision in the agreement that during the life of the option the Brewing Company or the Schades might conduct a business in the bottling works free of rent, with a provision against subletting.

It may be that a solvent private corporation conducting a successful business in this state may not sell out or abandon the corporate enterprise over the protest of minority stockholders. The rule is thus stated in *Lange v. Reservation Mining & Smelting Co.*, 48 Wash. 167:

“It is the contention of the appellant that neither the trustees, nor a majority of the stockholders of a corporation, have power, against the objection of minority stockholders, to sell or otherwise dispose of the entire property of the corporation, where no necessity exists for such action, such as the payment of legitimate debts, the prevention of further losses from a losing business, or such like causes. Unquestionably this was the rule of the common law as applied to a corporation organized to carry on a particular business, when such sale would have the effect of thwarting the purposes for which it was organized, and destroying the corporation itself; and especially was it true where the purposes of the sale was to ‘freeze out,’ or otherwise deprive the minority stockholders from further participation in the profits of the business conducted by the corporation.”

But no such case is presented here. The business which the Brewing Company was organized to promote and in which it was chiefly engaged had become unlawful by reason of the amendment to the State Constitution prohibiting the manufacture and sale of intoxicating liquors. After the adoption of this amendment the corporation was no longer a going concern, and if not insolvent in the sense that its debts exceeded its assets, it was at least insolvent in the sense that it could not pay its debts as they became due in the ordinary course of business. Finding itself in this plight, only one course was open to it. That was to dispose of its property, pay its debts, and

distribute the surplus, if any, among its stockholders. No other course has been suggested by counsel, and no other course suggests itself to the Court. The [35] power of the trustees to do this without the consent of all stockholders, so long as they acted in good faith, does not, in my opinion, admit of question. They might have made a general assignment for the benefit of creditors; they might have filed a voluntary petition in bankruptcy; or they might, as trustees for creditors and stockholders pursue the course followed in this case.

The claim that the agreement is void on the second ground calls for little comment in the light of facts. It was manifestly in the interest of all concerned that the property should be occupied in some way by some person. The right of occupancy for a given purpose was first granted to the corporation, and if the corporation did not elect to exercise the right then the like right was granted to the Schades, who in the past had the management and control of the corporate business. The Schades only obtained such rights as the corporation might accord them, and a fraud was neither committed nor contemplated by the parties. But if I am in error in this conclusion it can avail the plaintiff and interveners but little. The mortgage has been satisfied of record; the mortgagee has been placed in possession by the mortgagor, and the mortgage debt has not been paid. Under such circumstances the utmost relief that could properly be granted to either the corporation or the stockholders would be a right of redemption. If under any circumstances this suit could be treated as a suit of that

character or for that purpose, it should at least appear that either the corporation or the stockholders are ready and willing to pay the amount due on redemption. No such readiness or willingness is averred in the pleadings, and no such readiness or willingness was disclosed at the trial. Counsel frankly conceded that the stockholders did not have the means to effect a redemption, and further conceded that if they had the means it would not be deemed advisable to employ them in that way.

Under such circumstances, in any view of the case, the complaint is entirely devoid of equity and must be dismissed.

Let a decree be entered accordingly. [36]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 3281.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST CO., THE B.
SCHADE BREWING CO., B. SCHADE,
and L. R. STRITESKY,

Defendants,

and

MUTUAL SECURITIES COMPANY, M. H.
EGGLESTON, and A. G. AVERY, as Exec-
utors,

Intervenors.

Decree of Dismissal.

This cause came on to be heard at this time and was argued by counsel. Thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz: That the bill of plaintiff herein be dismissed out of this court and that the bill of intervention of the Mutual Securities Company be dismissed out of this court, and that the defendant Spokane & Eastern Trust Co. recover its costs against plaintiff and against said intervenor to be taxed.

FRANK H. RUDKIN,
Judge.

O. K. as to form.

CALEB JONES,
Solicitor for Plaintiff,

O. K. as to form.

POST, RUSSELL & HIGGINS,
Attorneys for Mutual Securities Co.

[Indorsements]: Filed in the U. S. District Court, Eastern District of Washington. November 3, 1920. Wm. H. Hare, Clerk. H. J. Dunham, Deputy.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that I have compared the foregoing copy with the original Decree in cause No. 3281, Erna Korn, Plaintiff, vs. Spokane & Eastern Trust Co. et al., Defendants and Mutual Securities Co., et al., Intervenors in the foregoing entitled cause,

now on file and of record in my office at Spokane, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said court this 28th day of June, 1921.

[Seal]

W. H. HARE,
Clerk.

By _____,
Clerk.

[Endorsed]: No. 3693. United States Circuit Court of Appeals for the Ninth Circuit. Certified Copy of Decree of Dismissal. Filed Jul. 1, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 3281.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST CO., THE B.
SCHADE BREWING CO., B. SCHADE and
L. R. STRITESKY,

Defendants.

MUTUAL SECURITIES COMPANY,

Intervenor.

**Notice of Lodgment of Statement of Facts and Time
and Place of Motion for Approval.**

To the Spokane & Eastern Trust Company and to
Messrs. Graves, Kizer & Graves, Your Attorneys
The B. Schade Brewing Company, B. Schade,
and L. R. Stritesky, Defendants:

YOU AND EACH OF YOU will please take notice
that the plaintiff and appellant in the above-entitled
cause has prepared and lodged with the clerk of the
above-entitled court a statement of the testimony of
the witnesses introduced at the trial of said cause,
entitled a statement of facts, a copy of which is here-
with served upon you.

AND YOU ARE FURTHER NOTIFIED that
the plaintiff and appellant will move the Court to
approve and direct filing of the same at 10 o'clock
A. M. on the 30th day of April, 1921, or as soon there-
after as counsel can be heard, at the United States
Courtroom at Spokane, Washington; and to further
order that the original exhibits referred to therein
shall be attached to said statement as a part thereof
to be considered as a part of the record on appeal in
said cause.

Dated this 20th day of April, 1921.

CALEB JONES,

Attorney for Plaintiff.

POST, RUSSELL & HIGGINS,

Attorneys for Intervenor,

Appellants. [37]

Service of the above notice by copy thereof, to-
gether with a copy of statement of the testimony of

witnesses, is hereby admitted this 20th day of April, 1921.

GRAVES, KIZER & GRAVES,
Attorneys for Defendant, Spokane & Eastern Trust
Company.

MRS. B. SCHADE,
Vice-President B. Schade Brewing Company.

MRS. B. SCHADE,
Executor of the Estate of B. Schade, Deceased.

L. R. STRITESKY.

[Endorsements]: Filed in the U. S. District Court,
Eastern District of Washington. April 20, 1921.
Wm. H. Hare, Clerk. By H. J. Dunham, Deputy.
[38]

In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.

No. 3281.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST CO., THE B.
SCHADE BREWING COMPANY, B.
SCHADE and L. R. STRITESKY,

Defendants;

MUTUAL SECURITIES COMPANY,

Intervenor.

Order Approving Statement of Facts.

The above-entitled matter coming on to be heard

on the 30th day of April, 1921, upon the presentation of a statement of the testimony of witnesses in this cause having been prepared by plaintiff and intervenor, appellants, and lodged with the clerk of this court upon the 20th day of April, 1921, and due notice of said lodgment and the time and place of asking the Court's approval thereof having been given and served on the defendants or appellees at least ten days prior to said 30th day of April, 1921, and the said statement having been corrected and agreed upon by the parties hereto and conforming to the facts;

Therefore, said statement, entitled "Statement of Facts," is found to be true and complete and properly prepared and is hereby approved. The inclusion of that portion of the foregoing statement of facts reproduced in the exact words of the witnesses by question and answer is in accordance with the desire of appellants in this cause.

Done in open court at Spokane, Washington, this 30th day of April, 1921.

FRANK H. RUDKIN,
District Judge.

[Endorsements]: Filed in the U. S. District Court, Eastern District of Washington. April 30, 1921. Wm. H. Hare, Clerk. H. J. Dunham, Deputy. [39]

In the District Court of the United States for the
Eastern District of Washington, Northern
Division.

No. 3281.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST CO., THE B.
SCHADE BREWING CO., B. SCHADE and
L. R. STRITESKY,

Defendants;

MUTUAL SECURITIES COMPANY,

Intervenor.

Statement of Facts.

Lodged this 20th day of April, 1921,

W. H. HARE. [40]

BE IT REMEMBERED that on the 18th day of
October, 1920, at a term of the District Court of the
United States, for the Eastern District of Washing-
ton, Northern Division, held at Spokane, Washing-
ton, the above-entitled cause came regularly on for
trial before the Hon. Frank H. Rudkin, Judge of said
Court, the plaintiff being represented by her counsel,
Messrs. A. G. Avery, John Merritt and Caleb Jones,
and the defendant, Spokane & Eastern Trust Com-
pany by Messrs. Graves, Kizer & Graves, and the in-
tervenor, Mutual Securities Company by Messrs.
Post, Russell & Higgins, whereupon the following
proceedings were had, to wit:

Mr. GRAVES.—I move at this time to dismiss the bill with prejudice and for final judgment upon the following grounds; the bill itself on its face shows that the corporation cannot maintain this action and the stockholders assuming the rights of a corporation cannot maintain it. Moreover, a stockholder who undertakes to sue in right of corporation must go further than to show a simple demand upon the corporation but must show that his rights as a stockholder are directly affected and that the corporation could maintain the same action and therefore the stockholder can maintain it on the refusal of the corporation; failing that, the bill will not lie. On the further ground that the bill contains no offer to do equity.

The COURT.—I think we will proceed with the testimony.

Whereupon Mr. Jones made an opening statement in behalf of plaintiff.

Mr. JONES.—At this time we should like to offer plaintiff's exhibit marked No. 1, which was read and admitted in evidence.

Exhibit No. 2, being notice of *Lis Pendens*, then read and admitted in evidence.

Plaintiff's Exhibit No. 3 was then offered and admitted in evidence. [41]

Testimony of L. R. Stritesky, for Plaintiff.

L. R. STRITESKY, one of the defendants, was sworn on behalf of the plaintiff and testified as follows:

Direct Examination.

By Mr. JONES.—I am the secretary of the B.

(Testimony of L. R. Stritesky.)

Schade Brewing Company and have been in that position since its organization in 1903 up to the present time. I know that the B. Schade Brewing Company acquired the land mentioned in plaintiff's complaint, Exhibit "A," from Mr. B. Schade in September, 1903.

Q. Do you recall the value of that property at the time of its acquisition?

Mr. GRAVES.—To that I object as immaterial and as too remote.

The COURT.—That is too remote to establish its bearing at the present time or have any bearing on it. I will sustain the objection.

Mr. JONES.—Q. Do you know, Mr. Stritesky, what amount was expended in the buildings on this property?

Mr. GRAVES.—To that I think I shall object.

The COURT.—At what time?

Mr. JONES.—At the time they were constructed.

The COURT.—When were the buildings constructed? A. From 1902 to 1908.

The COURT.—It seems to me so self-evident that money expended in the construction of the building 10 or 15 years ago has not the slightest relation to its value today. I will sustain the objection.

Mr. JONES.—I assume that an exception goes to all adverse rulings.

The COURT.—Yes.

Q. Do the books of the company show what amount has been expended in the construction of these buildings? I am asking this for the record.

(Testimony of L. R. Stritesky.)

The COURT.—Oh, for the purpose of making the record I will allow the answer to go in but I do not think it will influence any court in the world in reaching a conclusion. He may answer the [42] question if you desire. A. They do.

Q. What amount was it?

Mr. GRAVES.—To that I make the same objection.

The COURT.—I will allow it to go in for the purpose of making up the record in an equity case.

A. \$130,000.

The COURT.—He may answer the other question to which I sustained an objection, if you desire.

Mr. JONES.—Q. As secretary of that company do you know what was spent? The books of the company show what was spent for the equipment, the brewery equipment and machinery in that building? A. Yes, sir.

Mr. GRAVES.—We make the same objection.

The COURT.—Same ruling.

A. I do. It was \$152,000 approximately, in round figures. I am one of the defendants in this case. I do not know approximately the price paid for the land. I am familiar with the machinery that was in the Schade Brewing Company buildings. It is the machinery that was conveyed in this agreement that I signed as secretary of the company and the deed that I signed conveying the property to the Spokane & Eastern Trust Company. Mr. B. Schade owned 2606 shares of a total of 5000 issued in the B. Schade Brewing Company. There have been 5000

(Testimony of L. R. Stritesky.)

shares issued. Mr. B. Schade was the active manager and had control of the company at the time of the execution of Plaintiff's Exhibit "A," the agreement and deed.

Q. At the time that this agreement and deed mentioned in the complaint was executed by you, do the minutes of the B. Schade Brewing Company show any authorization to you to execute the instrument?
[43]

Mr. GRAVES.—To that I object. The minutes are the best evidence.

The COURT.—He cannot testify as to what the minutes contain. He can testify as to what they do not contain. If there is any minute on it, the minutes are the best evidence.

Mr. GRAVES.—The minutes fail to show any preauthority but they do show under the doctrine of the court a ratification, which is the same thing. I think the minute ought to be produced.

The COURT.—Are the minutes here?

A. They are.

The COURT.—You may introduce whatever record there is on that.

Mr. JONES.—I am placed in the position where if the minutes do not show it I would have to offer the whole volume of minutes to show that there was no minute.

The COURT.—Of course it will come out sometime. Counsel on the other side has stated that there was no preauthority but there is a ratification. You

(Testimony of L. R. Stritesky.)

can offer them in evidence. Is that satisfactory to you, Mr. Graves?

Mr. GRAVES.—Yes, put in whatever minute there in on this.

Q. Are there any minutes pertaining to this transaction? A. There are.

Q. Have you the minute-book?

A. The minute-book is on the table there.

Q. You may give the time of the minutes pertaining to this transaction.

Q. "Spokane, Washington, February 4, 1918. The regular monthly meeting of the trustees of the B. Schade Brewing Company was held at Mr. Schade's residence at 2:30 P. M. Officers present: B. Schade, President and Treasurer, S. Schade, Vice-President, L. R. Stritesky, Secretary. Minutes of previous meeting read and approved. The president drew to the attention of the directors that the Spokane & Eastern Trust Company holding the mortgage of \$50,000 against the corporation, had begun foreclosure proceedings some time ago, which proceedings if carried through the courts [44] would have caused unnecessary expense and no benefits realized. Therefore on the 24th day of January, an agreement entered into with the Spokane & Eastern Trust Company whereby the real estate of the company was conveyed to the Spokane & Eastern Trust Company with an option of repurchase until July 1, 1919, the purchase price of said option to be \$63,650.01 plus accrued interest and other expenses as fully set forth in agreement, a copy of which is

(Testimony of L. R. Stritesky.)

filed for record in Vol. "Q," Records of Contracts of the County on page 51, signed L. R. Stritesky (Seal)." I am reading from book of the minutes of the company, of the B. Schade Brewing Company. That is all of the minutes pertaining to this transaction in the book of minutes,—minutes of the directors or trustees. I remember the time of service of copy of the complaint in this action on me. Previous to that time counsel for the plaintiff had called on me in relation to this cause. They made a request or demand of me at that time. The request or demand was that the officers of the B. Schade Brewing Company start suit against the Spokane & Eastern Trust Company. Previous to that time I had not heard any conversation with other officers of the company in relation to this matter. My reply to the request or demand was that I couldn't do anything in the matter. I took no action. It was a verbal demand. After the demand was refused a copy of the complaint was served on me. The demand was made before the complaint was filed. Previous to that demand I did not know that a demand was made on Schade.

Cross-examination.

By Mr. GRAVES.—I own 91 shares of stock in the company. I owned two or three shares in the beginning and later on bought more. At the time of this transaction that was my holding. Mrs. Schade owned 50 shares. There is a reference to the foreclosure of this mortgage in the minutes of November 5, 1917. At that time the advisability of contesting

(Testimony of L. R. Stritesky.)

the proceeding was discussed and it was decided to get legal advice on the subject. At the regular [45] monthly meeting of December 3, 1917, it was reported at the meeting that counsel had been secured to represent the company at the coming foreclosure proceeding and that every effort would be made to secure justice to the company.

Mr. JONES.—I move to strike out the question and answer on the ground that it is immaterial and irrelevant in relation to the mortgage.

The COURT.—I will allow it to go in on the same theory that I allowed your testimony to go in, for the purpose of making up the record.

It is correct that at a meeting of October 1, 1917, Mr. Schade brought to the attention of the officers that on the 19th of September, and preceeding, the Spokane & Eastern Trust Company, the holder of the \$50,000 mortgage against the property of the company, had served notice of foreclosure proceedings upon the company's property. Ways and means were discussed of meeting this new turn of the company's affairs. Mr. Schade called attention to a letter which he had addressed to the stockholders asking for an expression of opinion from them in this crisis and means of meeting it.

Mr. JONES.—We make the same objection, if the Court pleases. My idea in making a general objection at this time is that I want to object to all testimony offered under cross-examination of counsel for defendants excepting that pertaining to the question of laches. All the balance I regard as immaterial

(Testimony of L. R. Stritesky.)

and I should like to have my position made clear.

The COURT.—I will allow it to go in, as I say, subject to the objection.

The WITNESS.—What occurred at the meeting of February 4, 1918, has already been read in evidence. Meetings were held monthly thereafter. At the meeting of May 6, 1918, announcement was made that operation in the bottling works, consisting of the manufacture of soft drinks, had been discontinued on the 10th of [46] and it is a fact that they had been discontinued and they were not resumed after that. At a meeting of June 3, 1918, various plans were discussed and considered for the sale of the machinery and equipment of the brewing plant as well as the real estate, several offers for the same having been made in the meantime. Hopes were expressed that some arrangement could be made to dispose of either a portion or the entire equipment and real estate. That matter was fully discussed. At the meeting of July 1, 1918, I find it stated, "There being no business activity at the company's plant there is very little of interest to bring before the company and the meeting adjourned very quickly." At the meeting of August 5, 1918, it is stated, "Mr. Schade stated that negotiations for the sale of the machinery were still in progress with several parties but that no definite results had been obtained." At a meeting of October 7, 1918, the record shows the following: "The only incident of note occurring was the statement of Mr. Schade that the negotiations for the sale of the brewing machinery

(Testimony of L. R. Stritesky.)

indicated good chances for the early sale of the same." At the meeting of November 4, 1918, it is reported: "Mr. Schade stated that the deal for the sale of the brewing machinery that had been pending for some time was still in the balance with good prospects of its going through. If successful this sale would enable the company to take care of the mortgage and thus release the property." These minutes record briefly and accurately what took place. At the meeting of December 2, 1918, Mr. Schade stated: "That owing to the embargo on shipping on the Pacific it was difficult to obtain results in making business transactions involving the sale of machinery in foreign ports." At the meeting of January 6, 1919, he reported that there was no change in the status of the sale of machinery but that the prospects were improving with the termination of the war. At a meeting of February 3, 1919, the negotiations for the sale of the brewing machinery were reported as proceeding slowly with various pending purchasers corresponding [47] regarding it. At the meeting of March 3d he reported that there was no change in the general situation but various negotiations were being carried on looking to the disposal of the plant. On April 7, 1919, he reported that negotiations for the sale of the plant were still pending with varying hopes of success. Nothing occurred except the election of officers on April 7th and at our meeting of May 5th our minutes say there was no developments in the disposal of the property. At the meeting of June 2d, 1919, the following oc-

(Testimony of L. R. Stritesky.)

curring: "Various properties of the company in outlying towns consisting of vacant lots of doubtful value were deeded to friends who had rendered the company valuable and friendly assistance in the past, as the company was unable to pay the taxes and other expenses that was due at that time." I signed the deeds for the reason stated in the minutes. At the monthly meeting of July 7, 1919, it was stated: "During a discussion of the business affairs of the company it was brought to notice that according to some alleged agreement entered into some years ago the property of the company was to pass into the possession of the Spokane & Eastern Trust Company on the first of July—," that would be at the end of the eighteen months period— "however, this agreement was made while Mr. Schade was seriously ill and since then several proceedings in court have occurred tending to further complicate the matter. The while affair is in an uncertain stage and the Spokane & Eastern Trust Company has made no move to take possession. The whole matter is being carefully watched and the interests of the corporation safeguarded, as Mr. Schade, the president of the company, while still not in possession of his full powers is commencing to feel like himself again." Subsequently the Spokane & Eastern Trust Company did take possession. I cannot give the date. I believe it was shortly after that and they have remained in possession ever since. Beginning with the incorporation of the company in 1903 up to the present time there have been stockholders meetings, ann-

(Testimony of L. R. Stritesky.)

ual meetings of stockholders. No notice was ever sent out. Others attending the meetings besides the [48] Schades and myself in the beginning. When the Spokane & Eastern Trust Company had acquired an interest or had sold some of the stock to some of their financial acquaintances, some of the officials of the Spokane & Eastern Trust Company and also some of the stockholders attended the meetings for several years. The officers of the Spokane & Eastern Trust Company owned a few shares of stock. The stockholders, I think. About 200 or 300 shares. And they sold to various of their connections some stock. I think they attended the stockholders' meeting in 1919. I would have to refresh my memory as to the last reorganization. Approximately it was 1907 and 1908, I think it was. For about four or five years thereafter there was an attendance at the stockholders meeting, four or five years after 1903, during 1907 and 1908. A while after 1903 Mr. Hess was a stockholder. John B. Hess, the attorney. Up to the time the Spokane & Eastern Trust Company acquired interest it was practically a closed corporation, that is Mr. Schade, Mr. Hess, Dr. Ritcher and a few others formed the corporation and they used to attend. When the Spokane & Eastern Trust Company came in they used to attend. They attended for several years and some of the people that they interested in it. Afterwards when business commenced to get to the point where it was not paying the interest seemed to fall off and they did not attend. Nobody attended, so that for a num-

(Testimony of L. R. Stritesky.)

ber of years before the transaction ended the stockholders' meeting consisted of the Schades and myself, and the Schades and myself were at all times the board of directors, and the stockholders' meeting and board of trustees' meeting have all been held at the same time and place.

Q. And you three people ran it?

A. We have—some of us run it in a way.

Q. As a matter of fact, Schade ran it?

A. Yes, sir.

Q. Just as he pleased? A. Pretty much so.

[49]

Q. From the date of the organization down to the time the thing went up in smoke?

A. I think that is very nearly correct.

Q. Well, it is practically absolutely correct, isn't it? A. I think you are right there.

There were a large number of local stockholders in the city. None of them attended except as stated. I understand at times they would come down and inquire about the business of the company and see Mr. Schade. The minutes of the company as they have been recorded were kept continually by me, not only at the times and places referred to but dates previous to that and the book of minutes was in the office of the corporation and I believe has always been open to inspection by any stockholder. The Schade Brewing Company quit business after prohibition went into effect in this state and they never did any more business except to run a soft drink establishment for some time afterwards. Not a great length of time

(Testimony of L. R. Stritesky.)

and on a very small scale. I don't think it was a paying proposition. If it had paid I suppose they would have kept on. I do not believe that from the time of prohibition up to the present date the Schade Brewing Company had a dollar's worth of money and cannot pay their taxes. Somebody besides the Schade Brewing Company paid the taxes. When the deed and agreement was signed foreclosure proceedings were pending on this mortgage. The company was represented by Mr. O. C. Moore. I do not remember that the question of deeding was discussed with me.

Q. Well, did you just sign the deed because Mr. Schade requested it?

A. Well, I suppose—it wasn't discussed. It was merely stated, as Mr. Schade usually did, that he would have to sign the property over. Couldn't pay the mortgage and there wasn't anything else to do. The question of having 18 months [50] additional time for redemption was discussed. It was hoped that in 18 months we might sell the machinery and possibly enough of the real estate to redeem. The only business that the company undertook to do in the 18 months was to try and do this and they failed utterly in it. They neither sold the machinery nor the real estate. They finally gave away what little outlying real estate they had because they didn't have any money to pay taxes on it.

Redirect Examination.

(By Mr. JONES.)

Q. At the time of signing this agreement you

(Testimony of L. R. Stritesky.)

stated that there had been no previous discussion with you as to the advisability of signing it, Mr. Stritesky?

A. I don't exactly recall. Of course I knew in a general way that the mortgage foreclosure proceedings were going on and we were threatened with a suit, and I suppose it was talked over that I knew something about. I wasn't concerned in the matter. I was just requested to sign the deed and agreement when it was presented. I do not recall who presented it to me. I do not recall the occasion now.

Testimony of Frederick Elmendorf, for Plaintiff.

FREDERICK ELMENDORF, a witness called on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct Examination.

My name is Frederick E. Elmendorf. I live in Spokane. I am in the real estate and investment. I have been in that business since 1892.

Mr. GRAVES.—His qualification to express an opinion will not be disputed.

Q. I will ask you if you are acquainted with the following described—

Mr. GRAVES.—Why don't you ask him about the Schade Brewing Company property?

Q. Are you acquainted with the Schade Brewing Company, the real property in Spokane? [51]

A. I am.

Q. You may state what in your opinion the value of the property was on January 24, 1918?

(Testimony of Frederick Elmendorf.)

Mr. GRAVES.—To that I object as immaterial.

Mr. JONES.—Just the real estate exclusive of building ? A. In the neighborhood of \$100,000.

Cross-examination.

By Mr. GRAVES.—I fixed the date at January, 1918. That wouldn't mean a forced sale subject to redemption. What it would have sold for at forced sale subject to redemption would be very difficult to say. There might have been some concerns that would have considered it but it would have been very difficult to have found them. I mean any kind of a forced sale would have been very difficult to get through.

Q. If a man had owned that property and had been up against it so he had to realize money, how long would it have taken him to have raised \$100,000 on it? That is the practical question here, not what it was abstractly worth.

A. I do not know. At that time Mr. Schade approached us frequently to see if we could sell the property. No we could not sell it. At that time Mr. Schade said he would not sell the property short of \$150,000 and we never were instructed or authorized—We have some people interested. I mean that there are people whom I think would have considered the purchase of the property if it could have been bought at what they considered would be reasonable. I think that they might have bought the whole property, that is the building and all for \$150,000. I have no reason to say that they would not.

Q. Suppose I had owned that property and come

(Testimony of Frederick Elmendorf.)

to you and said, "Elmendorf, I am broke, I have got to make a trade of this property quick, now what can you get out of it for me in cash so that I can pay off a mortgage or something," what would you have told me? [52] A. You mean right away?

Q. Oh, yes, that is in a period of three, or four or five months we will say.

A. Well, I would have said that it ought to have been sold for something between \$75,000 and \$100,000. I had nobody that offered me the money and I never found anyone that offered the money. There were some people at that time who were figuring on increasing their plant and business, I think might have considered it at some such money as that.

Testimony of S. E. Hege, for Plaintiff.

S. E. HEGE, a witness called on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. JONES.—My name is S. E. Hege. I live at Spokane. I have resided there nearly 15 years. I am in the real estate business.

Mr. JONES.—You also admit his qualifications, Mr. Graves?

Mr. GRAVES.—Yes.

WITNESS.—I am acquainted with the Schade Brewing Company property. In my judgment the value of the property on January 24, 1918, exclusive of buildings thereon was about \$100,000.

Cross-examination.

By Mr. GRAVES.—What would the property

(Testimony of S. E. Hege.)

have sold for in January or thereabouts, 1918, for real money, either with the buildings or without them?

A. If a proposition actually had been made, Mr. Graves, if the property had been placed in the hands of one party for several months and he would have sufficient inducements, it would not have surprised me if it had sold for \$100,000 to \$150,000, buildings and all. In answering that question I am not thoroughly posted on the merits of the building. I am not here to testify as to the value of it. [53]

Yes, I think the buildings would add to the value of the premises. I say if it had been placed in the hands of one man, the right kind of a person, I would not be surprised if they had sold it. I think that harder properties than that have been sold at prices corresponding to that.

**Testimony of L. R. Stritesky, for Plaintiff
(Recalled).**

L. R. STRITESKY, recalled as a witness for plaintiff, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. JONES.—I am an architect.

Mr. GRAVES.—We will admit his competency to speak as an architect; I won't deny it. I have used him myself.

WITNESS.—I am acquainted with the buildings on the Schade Brewing property. I was supervising architect and overlooked their construction. I

(Testimony of L. R. Stritesky.)

am acquainted with the property and was acquainted with it on January 24, 1918. I know its general condition and state of preservation.

Q. What was the property worth at that time, the building, the real property?

Mr. GRAVES.—To that I object, because it is not a subject that expert testimony can go to. A building that is constructed for a special purpose might be worth something for that special purpose. A building that was put up for a brewery might be worth something if they had breweries, but that is a luxury that has been denied us for some years.

A. The value in 1918 was \$184,057.

Cross-examination.

By Mr. GRAVES.—Generally, I got these figures by taking the original cost, figuring the replacement value and taking depreciation from it, assuming the rising cost of material, and also subtracting the depreciation from it. [54] I mean by depreciation the depreciation that any building is subject to that stands for any length of time. There is the depreciation due to the fact that the business for which it was intended no longer exists. It was damaged a little by the Milwaukee putting a road through there. Yes, I recall my testimony in the case of B. Schade Brewery against the Milwaukee.

Testimony of K. G. Malmgren, for Plaintiff.

K. G. MALMGREN, a witness called on behalf of plaintiff, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. JONES.—My name is K. G. Malmgren. I reside at Spokane. I am an architect.

Mr. JONES.—Is there any question as to his competency, Mr. Graves?

Mr. GRAVES.—No, sir, of course not.

WITNESS.—I am acquainted with the buildings situated on the Schade Brewing property. I have made an examination of them. I am familiar with their construction, their dimensions, etc. I regard the value or worth of that property on January 24, 1918—the buildings at \$210,000.

Cross-examination.

(By Mr. GRAVES.)

Q. Is that all? A. Yes.

The building was specially constructed for brewery purposes and built solely for that. It could be converted to other purposes. It consists of machinery-room, vat-room, and all the special purposes of a brewery. That applies not only to the arrangement but the windows, doors, lights, ventilation, its fittings and all that sort of thing.

Q. What use would you convert it into to make it worth \$210,000?

A. Well, that is out of my jurisdiction, I might say.

(Testimony of K. G. Malingren.)

Q. Your jurisdiction only goes to the abstract value, whether anybody wants it or not? [55]

A. To the building.

Q. I say, to the abstract value, whether any use could be put to it or not?

A. I figured on the building, the cost of construction of the building.

Q. Cost of construction of the building?

A. Yes.

Redirect Examination.

(By Mr. JONES.)

Q. You stated you figured the building could be converted into other purposes than brewing purposes? A. Yes.

Q. That could be readily done, comparatively?

Mr. GRAVES.—I object. The witness says it is out of his jurisdiction.

The COURT.—What is your business?

Mr. GRAVES.—He is an architect.

The COURT.—He may answer.

A. In my judgment it could be used for cold storage. It has ice machines and lots of space for storage purposes. —

Testimony of Kurt J. Schade, for Plaintiff.

KURT J. SCHADE, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

Direct Examination.

By Mr. JONES.—By name is Kurt J. Schade. I am a son of B. Schade, and reside at Spokane. I

(Testimony of Kurt J. Schade.)

have resided there practically all my life. I was in Spokane in January, 1918. My father B. Schade is the president of the B. Schade Brewing Company. I was familiar with the machinery and contents of the B. Schade Brewing Company at that time. I know practically all the machinery and brewery equipment that was in the building at that time. I had an inventory of every piece of machinery there. Previous to [56] that time I made an inventory of the machinery and equipment. I would say about six weeks or about a month before it was turned over into the hands of Spokane & Eastern Trust Company. I took a complete inventory of everything that was there. That was in the year 1919, I think the summer of 1919.

Witness was then handed Plaintiff's Exhibit No. 7, purporting to be a copy of the inventory taken.

WITNESS.—That is complete except for a sixty-ton refrigerating ice machine which is not in this list. The list was taken after the ice machine was sold. The list is not dated. The list here is all the machinery listed except the one piece that I know of that was stipulated to be sold, that is the 60-ton refrigerating machine. That was stipulated to be sold on the 23d day of April, 1920. All of this list of stuff including the ice machine I have referred to was in place on the 24th day of January, 1918. I recall when the ice machine was taken away from the property.

Plaintiff's Exhibit No. 7 was then offered and admitted in evidence.

(Testimony of Kurt J. Schade.)

Cross-examination.

By Mr. GRAVES.—The machinery as described does not state for use—the use is not stated because there was a lot of machinery really in there that could be used for other purposes than a brewery. I had nothing to do with this matter except make the list. Nothing outside of that. I have been trying to sell it for the last year or two.

Testimony of John Land, for Plaintiff.

JOHN LAND, a witness called on behalf of plaintiff, after being first duly sworn testified as follows:

Direct Examination.

By Mr. JONES.—My full name is John Lang. I have resided at Spokane for 27 years last past. I am vice-president of the Inland Products Company. During my residence here at Spokane I have been installing refrigerating plants and building breweries and contracting engineer. I am familiar with brewing machinery and refrigerators [57] used in breweries and I have been connected with breweries here in Spokane, some in Missoula, Montana, Boise, Idaho, and some in British Columbia. I installed refrigerating machinery in the breweries and ice factories. I was acquainted with the machinery and equipment of the Schade Brewing Company in January, 1918. I have seen it.

Q. What in your judgment will be the value of that machinery and equipment generally—both the brewery machinery and the equipment generally?

(Testimony of John Land.)

A. Well, I would suggest that it is two different statements because there is some brewery machinery that could not be sold for more than 25%, and then there is some machinery in there like pumps, belts, refrigerating plants, shafting, pulleys, electric elevator, and electric materials that are probably worth 50% while the brewing machinery which is not in demand very much, although occasionally there is a market for it, would be sold for not more than 25%.

Q. What value would you place of everything, what value would you place on the property approximately?

A. I would say from \$30,000 to \$35,000.

The COURT.—Does that include the property that was sold?

A. It is the machinery which I looked at of late. I was over there just about a week ago. I don't know just exactly whether some of these pieces had been taken out then or not, but whatever was taken out did not amount to very much. My estimate included an ice-machine. That is what I said you know in regard to valuation, the percentage of brewing machinery. My estimate would include everything in that line. It included the ice machine in question.

Cross-examination.

By Mr. GRAVES.—I cannot exactly say how long it would have taken to have sold the machinery. There were markets for it. I should think [58] it could have been disposed of inside of a year if

(Testimony of John Land.)

it were properly handled, so that if they were trying to sell it for a year and a half and couldn't accomplish it, it is my idea it was not properly handled.

Mr. JONES.—If the Court pleases, it is just barely possible after an examination of the minutes we may have some of the entries we would like to offer in evidence. Otherwise our case is closed.

The COURT.—Very well, you may offer them at any time.

Whereupon, the following evidence was introduced on behalf of the defendants:

Testimony of O. C. Moore, for Defendants.

Mr. O. C. MOORE, a witness called on behalf of the defendants, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. GRAVES.—My name is O. C. Moore. I am a resident of Spokane and a practicing counsel in this court. I represented the B. Schade Brewing Company and other defendants in a suit brought by the State Finance Company. It was a suit brought on a mortgage that had been given to the Spokane & Eastern Trust Company. The issues in that case had been made up and at that stage a proposition of making the deed here in question and giving the agreement in question came up. It was discussed between me and Mr. Edge representing the defendant, with the result that the deed was given and the agreement here in the case was executed. It was done after consultation and I don't think I offered

(Testimony of O. C. Moore.)

any opposition to it. I conferred with Mr. B. Schade and no one else. I frequently saw Mrs. Schade, but I do not believe she offered any advice or suggestion in regard to the transaction. I do not think I saw Mr. Stritesky in relation to it. I do not remember whether the suit was brought for hearing or set for hearing or trial at the time this agreement was entered into. I think it was reported for trial. I think the issues were all made up. That is my recollection of it. [59]

Cross-examination.

By Mr. JONES.—I represented not only B. Schade Brewing Company, but Mr. Schade and Mrs. Schade personally. I represented them all. There was a defense against the State Finance Company, that is my recollection.

Plaintiff's Exhibit No. 4 was then offered and admitted in evidence.

I was representing the B. Schade Brewing Company at the same time that I was representing B. Schade and Sophia Schade. There was an answer filed. I don't remember now what the defense was. I am inclined to think it was amended once or more, but I am not sure.

Plaintiff then offered Exhibit No. 5, which was admitted in evidence.

Plaintiff then offered Exhibit No. 6, which was admitted in evidence.

Testimony of Lester P. Edge, for Defendants.

LESTER P. EDGE, a witness called on behalf of defendants, after being duly sworn on oath, testified as follows:

Direct Examination.

By Mr. GRAVES.—My name is Lester P. Edge. I am a resident of Spokane and counsel in this court. I represented the State Finance Company, or the Spokane & Eastern Trust Company, on the foreclosure of the mortgage here in question. I have in mind the provisions in the contract and set out in the complaint that Mr. Schade might occupy the property and run some bottling works there without charge during the redemption period. This was quite a large property and it was necessary in order to expedite the sale of it that some one be around there so that it would not have a deserted, abandoned appearance. The Schades were interested in effecting a sale and we considered it best for the interest of everybody that it have more or less the appearance of occupancy for our [60] benefit as well as their own. The Spokane & Eastern was anxious to have a sale made, as anxious as the Schades were. The reason the Schades were permitted to occupy it was to obviate the expense of a caretaker. I did not see the Schades or Stritesky. Mr. Schade was a pretty sick man most all the time. When the suit was started Mr. Moore appeared representing all of the defendants and interposed some defense. We had sued Schade for

(Testimony of Lester P. Edge.)

deficiency judgment and upon his guarantee asked for a judgment upon all the rights we had under the notes and under the mortgage. The matter dragged along for a little while. Mr. Schade was very sick and this represented everything he had in the world, and the bank was not disposed to be hard on him or take a judgment on it. I so told Mr. Moore, and discussed it. I know the Schades personally very well and the bank was willing to give him a reasonable time. The bank had taken care of the taxes, fire insurance and everything else on the property and Mr. Schade was sick. He was not in a position to go into court. As counsel I felt he should have a very lengthy continuance on the ground of his physical condition, and the bank was willing to give him any reasonable length of time to make a turn financially and his counsel stated that if he was given this year and a half, it amounted to nearly two years from the time foreclosure was started, that they probably could make a turn during that time—make a sale. Probably his health would improve, and if I recall, I think Mr. Moore stated that they thought at that time they could get some of the stockholders in who would help to refinance their company and that they had the matter up with some of them to devise some way of raising the money to pay it off, and the bank was willing to give them any reasonable length of time to do it, and for that reason gave this deed and took back an option to repurchase which was six months longer than the period of redemption would

(Testimony of Lester P. Edge.)

be under a foreclosure. The negotiations continued between Mr. Moore and myself for some time, from September up to January. I think the case was set [61] for trial at the time. The negotiations were entirely conducted by Mr. Moore and myself, and he consulted with them because he would not agree to anything without first consulting them. We consulted back and forth with our clients. It was never suggested at any time that there was any intention of defrauding anybody or anything of that kind. The clause about his running the bottling works a while without rent was not put in for any other purpose than that indicated. The bank was extremely anxious, if possible, to have the Schade Company redeem the property. Yes, reorganize. They said they had been more or less associated with the Schade people. Many of the bank's friends owned stock in the concern. They had sold some of the stock to some of these people. They had endeavored or had recommended it as being good investment and they wanted these people to get back, reorganize, and save what they could out of it. As a matter of fact, I think during the negotiations the bank was willing to accept a reasonable discount at one time from its notes and mortgages if the matter could be handled in some way or wait a reasonable time on a reorganization; extend this paper in some way, that was talked.

Cross-examination.

By Mr. JONES.—The agreement was finally drawn. It was drawn after negotiation and this

(Testimony of Lester P. Edge.)

talk back and forth. I would not necessarily say that our negotiations and discussion culminated in the contract, or that that is the result of our negotiations.

The COURT.—That is what they were leading up to, and that is where they stopped.

Redirect Examination.

By Mr. GRAVES.—It is my judgment that the case was set for trial, I would not be positive, but if I had to pass one way or the other my recollection is that it was and it was continued once or twice pending these negotiations. [62]

Testimony of Sophia Schade, for Defendants.

SOPHIA SCHADE, a witness called on behalf of the defendants, after being first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. GRAVES.—Mr. Schade is not well enough to come to court. Miss Korn is one of the stockholders; she is some relation; she is a niece, that is all, of Mr. Schade, but she has not been intimate with us for a couple of years, more than that. She got her stock from Mr. Schade. He didn't give it to her. She bought it with her own personal money that was left by her father.

Mr. GRAVES.—I want to offer in evidence the original Articles of Incorporation and the amended articles of incorporation. I suppose it is not necessary, Mr. Jones, to put in all of these; I can read in what I want?

Mr. JONES.—Subject to our objection.

Mr. GRAVES.—Certainly.

The COURT.—Read in what you desire.

Mr. GRAVES.—The object under the original agreement for which the corporation was formed are set out in the complaint, your Honor. The amended articles of incorporation I think were adopted in 1907, yes, at a meeting held on the 12th of April, 1907. The objects are stated as follows: "The objects for which this corporation is formed are: to purchase, buy, manufacture, sell and deal in all kind of malt products, to purchase, manufacture and sell ice, fuel and fuel products of all kinds; to purchase, lease, own, operate, mortgage, sell and convey a general brewing and malting business of beer and all malt products, and also in a general ice, fuel and fuel products business; to purchase, acquire, build, erect, own, operate, lease, mortgage, sell and convey breweries, malt houses, bottling works and ice and fuel manufacturing plants and machinery; to purchase, lease, own, operate, mortgage sell and convey real and personal property for any purpose which the corporation may deem expedient or necessary to aid in, increase, or [63] protect any business it may now or hereafter become engaged in." Then there is this little clause, "To do anything which is in the aid of that," which I do not consider necessary to read. Your Honor will remember that the original articles were conditioned solely to running a brewery, buying and selling such real estate as necessary for that purposes. I *serire* to read

in certain by-laws of the company.

Mr. JONES.—Subject to the same objection.

The COURT.—Yes.

Mr. GRAVES.—First I want to read Article 16, regulating meeting of stockholders as well as for monthly meeting of the trustees; “Article XVI. For the regular annual meeting of the stockholders as well as for the monthly meeting of the trustees, no special notice need be given and every trustee, officer or stockholder is to be bound by the provision made in these by-laws as far as the time and place is concerned of such meeting and any party taking stock in the corporation of this company shall take the same subject to the provisions and condition contained therein. Special stockholder’s meeting may be had provided the majority in amount of the stockholders consent to said meeting and sign a notice for the same and in that case the president when notified by said majority in amount of the shares of the stock in this company shall either give notice to all of the stockholders in the manner as the notice of special meetings for the board of trustees, or in case any stockholder or stockholders cannot be found within the city and county of Spokane, Washington, said notice shall be served by publication in some newspaper printed and published in said city and county of Spokane once a week for two consecutive weeks. The publication of such notice shall be intended for and be binding upon all the stockholders of this corporation.”

“Article IV. The office of treasurer and pres-

ident may be held by one and the same persons, who shall hold office for the term of 12 months or until his successor is chosen and qualified [64] unless such officer shall be removed for any cause whatever by the unanimous vote of the board of trustees. All other officers of said corporation can be removed by a majority vote of the board of trustees."

"Article V. The President shall preside at all meetings of the board of trustees and of the stockholders; he shall act as an inspector of election, sign all deeds, checks, contracts, on behalf of the corporation, and all certificates of the corporation, and shall purchase all materials and whatever is necessary for the purpose of carrying on the business of this corporation, and shall have the right to hire and discharge such persons and employees on such terms and conditions as he may deem necessary and to the best interest and advantage of the corporation, and shall have and exercise a general supervision and superintendency over the entire business and affairs and property of the corporation. Said president may delegate his authority, rights and powers from time to time as he in his judgment may deem to be to the best interest of the corporation."

**Testimony of Walter G. Merryweather, for
Defendants.**

WALTER G. MERRYWEATHER, a witness called on behalf of the defendants, after being first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. GRAVES.—My name is Walter G. Merry-

(Testimony of Walter G. Merryweather.)

weather, of the firm of McCrea & Merryweather. I have been in the real estate business in this city 29 years. On the 24th day of January, 1918, I was called upon by the Spokane & Eastern Trust Company to value the real estate of the Schade Brewing Company down here by the river. I made such valuation. The way of it was I think Mr. Malott came in and asked me what I would hold that property at. I think I made the appraisement independently, as I recall it. I made the appraisement of the real estate independent of the building. I don't think [65] I gave any views or expressed any opinion as to the value of the buildings, or the property with the buildings on it, no, sir, I think I did not. No, I wouldn't consider that I was qualified to tell anything about the value of the buildings. I reported my appraisement to the Spokane & Eastern Trust Company. I appraised the real estate at \$20,000. I don't recollect that they told me why they wanted the appraisal. I know that Mr. Schade and the Spokane & Eastern had some business together. I am now of the opinion that it was a fair valuation. I think that was approximately. I don't believe that the property could have been sold within a reasonable time after that date for any more than that for cash. The state of the real estate market in Spokane was very quiet at that time. The last month or two or three months there has been a little more demand, but it is not what you would call good on any business property. Some residences have been selling but not business prop-

(Testimony of Walter G. Merryweather.)

erty, to speak of. The land as I recall it is between 75,000 and 80,000 square feet. Rough laying land between Trent Ave. and Sheridan St. and the river and rocky. In my opinion it could only be used for special purposes. It is entirely cut off by the streets and railroad tracks and the river from all other property around there. It has been used for this brewery business a great many years. The buildings are different buildings. They were constructed for and adapted to the brewery and bottling business. There was no demand at the time for property so situated. We had not been able to dispose of anything of that kind or character for some time.

Cross-examination.

By Mr. JONES.—I am not both a stockholder and director of the Spokane & Eastern Trust Company. I am a stockholder, that I am indirectly. Yes, I guess that is in my personal name, I can't tell you. My estimate of the value of the real property exclusive of the buildings is \$20,000. There is about 11 what we call ordinary [66] size lots 50 by 120. That would make, I imagine, about two acres or a little less than two acres. There would be about 70,000 square feet, I would say it is a little less than two acres. The buildings are not suitable for any other purpose than brewing purposes. The property there is located in near proximity to railroads. There is one goes underground almost adjoining there, and there is another tract there on an elevated line. In estimating its valuation I took into consideration the prospects of its being used for

(Testimony of Walter G. Merryweather.)

warehouse purposes owing to its location on railroads. In making this appraisalment I did not consult my partner, Mr. McCrea. He never paid any attention to the real estate business, consequently I did not consult him, that is to say any attention—very little attention. Mr. McCrea did not consult me on an appraisalment that he made in 1907 of the same property, now, that I recall. I do not know whether he made an appraisalment of \$100,000 for this property in 1907. I would not swear to it that I did not know about it, that is some time ago.

Testimony of A. D. Jones, for Defendants.

Mr. A. D. JONES, a witness called on behalf of defendant, after being duly sworn, testified as follows:

Direct Examination.

By Mr. GRAVES.—My name is Arthur D. Jones. I reside in Spokane. I am the head of Arthur D. Jones & Company, and have been in the city 34 years this year. I am acquainted with the Schade Brewing Company. I was called on about the 24th of January, 1918, by the Spokane & Eastern Trust Company to make an appraisalment of that property. I do not remember what individual called on me. I don't remember that they told me what they wanted to know for. They asked me for the value but I don't remember what they told me they wanted it for. They might have. I made an appraisalment and reported it to them. I made the appraisalment of just the real estate. I appraised it at that time

(Testimony of A. D. Jones.)

at \$25,000. [67] I think that was about the right price at that time. I couldn't tell anything about the value of the buildings on it. I did not investigate the buildings. I am not a builder. Yes, I know what it was built and used for. I know it could not be used for that purpose at this time. I think it would have been difficult to have gotten that much money for it in cash at that time. It is possible; during the past year that that sort of real estate has not been marketable for some time. There is no sale of any real estate, of any kind of real estate, has not been very marketable, except houses, until the last year or two. And another thing that holds that kind of property is the railroads have so much property that they can lease out to people to build warehouses on and their leases are made on pretty reasonable terms, and it is more profitable to build on property that they keep for that purpose, unless you can buy that kind of property very reasonable. I do not think of any general purpose that the property is available for, such as mercantile purposes, and that sort. It is not fit for that. Of course, there is Burgan on North Division Street. He is in the mercantile business, but I don't think it would be suitable for his kind of business. I do not understand that part of the property lies under the shores of the river.

Cross-examination.

By Mr. JONES.—I made the appraisement in 1918. I don't remember the exact time. I appraised it at that time at \$25,000 at the request of the Spokane &

(Testimony of A. D. Jones.)

Eastern Trust Company. I do not remember the particular person that came to me about it. I do not know the reason why the appraisement was made excepting in a general way I supposed it was something in regard to settling up the estate or receivership or whatever the proceedings were. I didn't inquire into that. As a matter of fact, the appraisement was not made on its value as security for that amount. That wasn't the object of the appraisement. I tried to give the fair value [68] for selling or leasing or loaning. I tried to get at what I thought was a fair value. That was my best judgment as to what the fair value was for the land. There was 78,000 square feet, which would amount to about 11 lots as I understand it. That was in information about it. I didn't take any tape line to the premises and measure it. I didn't make any measurements at all. I appraised the ground as it was represented to me, which was as I have just told you. I knew the site and dimensions of the ground. The representation made was just as I told you a minute ago, about 78,000 square feet. There is other property within the same distance from the business center of town of that extent that has the same railroad facilities for warehouse purposes. I think other properties have been just as good. I think most any of these properties on most any of these railways have just as good facilities. I am not an officer or stockholder of the Spokane & Eastern Trust Company. I have no business relations with them now. I had

(Testimony of George M. Colburn.)

not at the time the appraisement was made. The appraisement was made exclusive of the building, just the ground is all I took into consideration.

Testimony of George M. Colburn, for Defendants,

GEORGE M. COLBURN, a witness called on behalf of the defendants, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. GRAVES.—My name is George M. Colburn. I reside in Spokane. I am in the real estate business. I have been in the real estate business 21 years. I am in the office with Mr. Elmendorf and am employed by his firm. I am acquainted with the Schade Brewing Company property and have had occasion to examine the property on and off the last few years. I endeavored to sell it on probably 15 different occasions. I began at the request of Mr. Schade. I followed it up myself and got an idea I could sell it by having the co-operation of the Spokane & Eastern—. I negotiated with men that would be as likely as anybody I could find [69] or know of. I did not keep an accurate account of the number of times, I should say 12 or 15. I think you have known me long enough to know as to whether I am a pretty good salesman.

Q. I will ask you, during the period say from the 24th of January, 1918, down to the present time, if that property could have been sold for any amount and sold for what amount just as she stands, buildings, machinery, and everything?

(Testimony of George M. Colburn.)

The COURT.—What was the highest price you would have gotten for it during that time?

A. Well, I always placed a minimum of \$100,000. I was not authorized to sell it for \$100,000, but I was trying to get all the way from—I started at \$200,000, and came down to \$125,000, and I imagined if I got an offer of \$100,000 it would go through, but I didn't get the offer.

During that period I didn't get any offer at all. I always felt if I could find the right party he would buy it. I never felt we would have to go below \$100,000. Yes, sir, if we were lucky in striking the right man we thought we could get that for it, but we did not strike anybody that would give that for it. I would say as the building stands, building, machinery and all, it is worth that amount, in my judgment.

Q. If you could find the right man?

A. Yes, sir.

Cross-examination.

By Mr. JONES.—In the last figures I gave I included the machinery in the building. I figured that the machinery and the building would be the added inducement for a buyer to buy and I figured the whole thing at \$100,000. I have been with El-mendorf for two years February next. While I was seeking for a purchaser I was acting for El-mendorf & Pope. I am a salesman working on commission. Our office is divided into departments and I am in charge of the business properties department. Mr. Schade was the man that I first had

(Testimony of George M. Colburn.)

authority from to find a buyer. I took [70] the matter up with Mr. Schade direct, but I was acting as salesman for Elmendorf & Pope on a commission basis. I am still with Elmendorf. We took the matter up with 12 or 15 individuals or firms that we thought could well afford to buy the property, that in our opinion would have use for it, and therefore would buy it at the price. Some of the firms were in this city, and some of them were not. That was done by me representing Elmendorf & Pope in their behalf.

Testimony of Connor Malott, for Defendants.

CONNOR MALOTT, a witness called on behalf of defendants, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. GRAVES.—My name is Connor Malott. I am vice-president of the Spokane & Eastern Trust Company.

Q. What relation does the State Finance Company have to the Spokane & Eastern?

A. It is the equitable owner of all the stock of the State Finance corporation.

I believe that the mortgage made by the Schade Brewing Company to the Spokane & Eastern Trust Company was assigned to the State Finance Company for the purpose of foreclosure and that was its sole interest in it. The real ownership continued in the Spokane & Eastern. When the settlement was negotiated, this deed and contract was

(Testimony of Connor Malott.)

negotiated, I represented the Spokane & Eastern. It was negotiated on the basis that the Spokane & Eastern owned the mortgage. This debt of \$50,000 arose out of a loan, *an* straight loan. The amount stated in that connection was the correct amount due, principal and not \$50,000 and other charges, making \$63.653.01. At that date there were outstanding delinquent taxes accrued with interest of \$5,895.45. Delinquent tax certificates were issued for \$5,485.45. They were taken up by the bank, the Spokane & Eastern. [71]

Q. Since the date of that contract, what amount has the bank paid out or expended in respect to the property?

Mr. JONES.—Of course, it is understood that all of this testimony is immaterial from our standpoint and we object to it on that ground.

The COURT.—Give the total, if you have the total there.

A. There is a number of items, taxes, insurance—

The COURT.—Give the total if you have the total there, add them up so you can give the total.

A. Yes, the total paid since then has been around \$8,000, since then paid out.

I have computed the interest from January 24, 1918, down to the present time and interest on other payments. We have here \$71,864.79, and interest is \$13,128.82, so that the advances and interest as of to-day are just under \$85,000. We have not received any income from the property whatever. We

(Testimony of Connor Malott.)

have made a few sales of personal property. Yes, I represented the Spokane & Eastern in negotiations which led up to this deed and the making of this contract. The original debt of \$50.000 ran a long time. We absorbed—the Spokane & Eastern Trust Company absorbed the Traders National Bank in May, 1914, and the debt, a large part of it, was taken over from the Traders and was carried forward until these proceedings liquidated it. During negotiations in these settlements I discussed the matter with Mr. Schade and Mrs. Schale and young Mr. Schade. I knew the financial condition of the company at that time. Unfortunately, the bank, some of the officers of the bank, owned stock in it, and some of their clients owned stock in it. I caused these appraisements to be made by these gentlemen who have testified here. The appraisements were made between the 28th day of January, and 3d of March, just in that two months' period. The prime purpose of the inquiry was to put this thing in condition that the stockholders of the Schade Brewing Company might protect their property. We had in [72] contemplation then taking the stockholders in a reorganization and so on. The purpose was to find out the value. I don't recall that I communicated to these gentlemen the purpose of the appraisals. I gave them no intimation as to whether we wanted it appraised high or low. All we wanted was to get an accurate appraisal as we could get. My opinion as to the value of the property is embodied in that circular letter under date of March 21, 1918, which

(Testimony of Connor Malott.)

was sent to the stockholders. The object of sending the letter to the stockholders was to get the stockholders over to a meeting to see if something could not be done to sell this property before the expiration of the period of redemption. I prepared the circular letter. A number of the stockholders came in. I wouldn't undertake to give you the number. This letter and this is the exhibit that goes with the letter.

Mr. GRAVES.—I will put them both in.

The letter admitted in evidence, marked Defendants' Exhibit No. 9.

WITNESS.—I should say seven or eight of the stockholders came in. The project was that we were acquiring this *prioerty* out of our investment, which was \$63,000 odd dollars, and we asked the stockholders to attend a meeting in January, 1918, where they could consider the situation, and we then proposed to them that if they believed the property had a value in excess of the amount of our claim, \$68,000, we would assign them the property on the payment of our debt, and we modified our proposition to the extent of saying if they couldn't take it over as an entirety we would let them come in as a personal party and by paying the amount of our debt and they would then become relative participants. That was reduced to writing in letter marked Defendants' Exhibit No. 8, and rejected by the Court.

Cross-examination.

By Mr. JONES.—I stated that the Spokane &

(Testimony of Connor Malott.)

Eastern Trust Company were [73] the equitable owners of the Finance Company. I mean there are four or five directors shares out to qualify some of the officers of the Spokane & Eastern Trust Company as directors of the Finance Company. I suppose the stock stands in their names, but it is the equitable owner of all of the stock. It is the legal owner of all excepting four of five shares. I do not believe that there has been a dollar of income on the property. There has been some sold or disposed of. That what was sold under stipulation referred to this morning. I wouldn't undertake to answer whether or not any property besides the large ice-machine was sold or disposed of. I do not know. Mr. Hubbard would know. When we sent them a letter I meant that we wanted to protect the equity of the stockholders of this property.

The letter was thereupon marked Plaintiff's Exhibit No. 9 for identification. Witness was then shown Plaintiff's Exhibit 9.

That is one of the letters I referred to as protecting the equities of stockholders.

Plaintiff's Exhibit No. 9 was offered and admitted in evidence.

Redirect Examination.

By Mr. GRAVES.—The notes were surrendered to the B. Schade Brewing Company when the deed was made. I am definitely clear that the mortgage was released on record.

Mr. GRAVES.—It may be stipulated that the mortgage was released?

(Testimony of J. M. Geraghty.)

Mr. JONES.—Under the general objection that the whole matter is immaterial.

Testimony of J. M. Geraghty, for Defendants.

J. M. GERAGHTY, a witness called on behalf of defendants, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. GRAVES.—I am a resident of Spokane, and have been for 29 years. [74] I am a practicing lawyer, now corporation counsel for the city of Spokane. I was counsel for the Schade Brewing Company for a number of years, up to the time I became Corporation Counsel and possibly some time after. Mr. Schade came to me, I don't know when, I used to be in a formal way his counsel. I didn't know anything about this foreclosure proceeding. I knew that there was a mortgage on the property to the Spokane & Eastern for \$50,000. Running over a period of time I had several conferences with Mr. Malott and possibly others of the bank. I don't know that it had reference particularly to the foreclosure. It was just a general discussion as to the best way to meet the situation.

Q. What was the condition of the Schade Brewing Company at that time as to finances?

A. Well, now, or course, I don't know.

Q. What was your information as to whether they could pay off that mortgage or not?

Mr. JONES.—I object to that as being absolutely immaterial.

(Testimony of J. M. Geraghty.)

The COURT.—He may answer if he knows.

A. Of course the negotiations were predicated on their inability to meet the notes. The talk of foreclosure had run a year or two. The latter end of the discussion had reference to some adjustment that would avoid foreclosure. I cannot recall the details. I don't know just what you mean by negotiations. All I had was a very indefinite idea. Mr. Malott called me up several times, sometimes he came to see me and my going to see him as to what could be done—later had in mind avoiding foreclosure by having the property conveyed with the stipulation to buy it back or take it back after a period.

Q. Now, was that communicated to the Schades by you?

A. Well, all that I did was under their direction, under Mr. Schade's direction.

Mr. Malott and I were not able to get together. Before [75] it reached any conclusion I dropped out of it. These negotiations lasted, I am sure, several months.

Cross-examination.

By Mr. JONES.—I was acting under the immediate direction of the Schades. I assume I was acting for the brewery, the Schade Brewing Company. All I ever did was presumably for the Schade Brewing Company. I couldn't fix the date that I was negotiating on behalf of the Schade Brewing Company. I suppose I represented Mr. Schade or the brewery for ten years previous to that time. Mr.

(Testimony of J. M. Geraghty.)

Graves has identified the time as some time in 1917. I don't know just when. Mr. Schade had very little business other than the details of preserving the property after the state went dry and I was so pre-occupied by other business that I couldn't give his matter attention. There was no settlement or adjustment made by reason of my negotiations. The thing was all in the air when I ceased to have anything to do with it.

Testimony of Conner Malott, for Defendants, (Recalled).

CONNER MALOTT, recalled as a witness on behalf of defendants, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. GRAVES.—Yes, I have a copy of the circular letter sent out by Mr. Schade, sent out to the stockholders of the Brewery Company. There were two such letters. The first is dated September 24, 1917. I have no knowledge as to whether the letter went to the stockholders or not other than what appears on the face of it. There were two letters sent out by Mr. Rutter as President of the Spokane & Eastern Trust Company.

Letter marked Defendants' Exhibit No. 10 was offered and admitted in evidence over the objection of counsel for plaintiff on the ground that it was immaterial and not properly identified.

Mr. GRAVES.—I offer in evidence letter of May 31, 1918.

(Testimony of Connor Malott.)

Mr. JONES.—We object to that as being immaterial and does not [76] show to whom it was sent and does not show that it was sent to the plaintiff in this case.

The COURT.—It will be admitted for what it is worth.

The letter was admitted in evidence and marked Defendants' Exhibit No. 11.

Testimony of Sophia Schade, for Defendants (Recalled).

SOPHIA SCHADE, recalled as a witness on behalf of the defendants, after being first duly sworn, testified as follows:

Direct Examination.

By Mr. GRAVES.—On being shown Defendants' Exhibit 10 she stated: At that time I had very little to do with the company. I knew that they were sending out—as far as I know it was sent, out to all of the stockholders. Of course I didn't mail them. I had the impression that it was sent to all the stockholders. I don't know whether it was or not. Referring to Exhibit 11, I guess that was sent to them all too. It was intended to be. That was the understanding. Most of the stockholders I guess were out of town except what there were here with the Spokane & Eastern Trust Company, and it was sent to those out of town, in town and elsewhere. Yes, Mr. Schade had a list of stockholders before him.

Cross-examination.

By Mr. JONES.—I cannot recollect because I really

(Testimony of Sophia Schade.)

did not take any part in sending these letters. As a matter of fact, I don't know whether it was sent to the plaintiff or not. I can't swear to it. I have no way of knowing because I never took any—you know I was not connected with the brewery until the last two or three years, since Mr. Schade has been ill.

Witness excused.

Whereupon an adjournment was taken to Thursday morning at 10 o'clock, at which time the following proceedings were had:

Mr. Jones moved the Court for permission to reopen plaintiff's case for the presentation of testimony by himself, which permission [77] was granted.

Testimony of Caleb Jones, for Plaintiff.

Mr. CALEB JONES, on being duly sworn, testified as follows:

That on or about July 15, 1919, on behalf of the plaintiff I made demand upon the B. Schade Brewing Company through its officers B. Schade as President to bring or cause to be brought an action against the defendant, Spokane & Eastern Trust Company, to set aside as illegal and void said warranty deed and agreement, and a few days later called on L. R. Stritesky, Secretary of said company, and made a like demand, and said officers refused to bring such an action or take any steps for a avoidance or disaffirmance of said deed and agreement.

Mr. Graves then moved the Court for permission to reopen defendants' cause and introduce in evidence Defendants' Exhibit No. 12, which permission

was granted and said exhibit was introduced and admitted in evidence.

[Endorsements]: Filed in the U. S. District Court, Eastern District of Washington. April 30, 1921. Wm. H. Hare, Clerk. H. J. Dunham, Deputy. [78]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3281.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE, and L. R. STRITESKY,

Defendants;

MUTUAL SECURITIES COMPANY,

Intervenor.

Petition for Appeal.

To the Honorable FRANK H. RUDKIN, District Judge of the District Court of the United States for the Eastern District of Washington, Northern Division:

The above-named plaintiff and the above-named intervenor feeling themselves aggrieved by the decree made and entered in this cause on the 3d day of November, 1920, do hereby appeal from said decree to the Circuit Court of Appeals of the United States for

the Ninth Circuit, for the reasons specified in the Assignment of Error filed herewith, and they pray that their appeal be allowed and that a citation be issued as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California, and your petitioners prays that a proper order touching the security required of them to perfect their appeals be made.

CALEB JONES,

Attorney for Plaintiff.

POST, RUSSELL & HIGGINS,

Attorneys for Intervenor.

The foregoing petition granted and appeal allowed upon giving bond conditioned as required by law in the sum of Three Hundred (\$300) Dollars.

Dated this 2d day of May, A. D. 1921.

FRANK H. RUDKIN,

Judge. [79]

In the District Court of the United States for
the Eastern District of Washington, Northern
Division.

No. 3281.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE, and L. R. STRITESKY,

Defendants;

MUTUAL SECURITIES COMPANY,

Intervenor.

Assignments of Error.

And now on this 2d day of May, A. D. 1921, came the plaintiff represented by Caleb Jones, her counsel, and the intervenor Mutual Securities Company, represented by its counsel, Post, Russell & Higgins, and say that the decree entered in the above cause on the 3d day of November, 1920, is erroneous and unjust to plaintiff and intervenor:

(1) The Court erred in dismissing plaintiff and intervenor's complaints on the ground that the trustees of The B. Schade Brewing Company had power to enter into the agreement (Plaintiff's Exhibit "A") and execute the conveyance mentioned in paragraph 7 of plaintiff's complaint, for the reason that there is no controversy over the facts; that said contract is *prima facie* invalid, showing a violation of the fiduciary relation which exists between the trustees

and the company and the trustees and individual stockholders in this; that the officers executing the same received certain rights and concessions in said agreement mentioned as an inducement for its execution not enjoyed by the minority stockholders of said corporation; that the execution of the contract and the conveyance of all of the corporate properties thereunder was contrary to the Charter of The B. Schade Brewing Company, in violation of the statutes of the State of Washington, and an infringement upon the rights of the minority consenting [80] stockholders.

(2) The Court erred in dismissing plaintiff's and intervenor's complaints on the ground that the trustees of The B. Schade Brewing Company could dispose of all its corporate property without the unanimous consent of all the stockholders, for the reason that it is contrary to its Charter, in violation of the statutes of the State of Washington, and of the individual rights of the minority nonconsenting stockholders.

(3) The Court erred in dismissing plaintiff's and intervenor's complaints on the ground that the president and secretary of The B. Schade Brewing Company could dispose of all of the property of said corporation without the previous authorization of the board of trustees and all of the stockholders, for the reason that it is contrary to its Charter, in violation of the statutes of the State of Washington and of the individual rights of the minority nonconsenting stockholders.

(4) The Court erred in dismissing plaintiff's and

intervenor's complaints on the ground that the life of The B. Schade Brewing Company was not suspended by the conveyance of all of its property to the defendant Spokane and Eastern Trust Company, for the reason that said conveyance was contrary to the Charter of The B. Schade Brewing Company, in violation of the Statutes of the State of Washington and of the individual rights of the minority nonconsenting stockholders.

(5) The Court erred in dismissing plaintiff's and intervenor's complaints on the ground that the amendment of the State Constitution prohibiting the manufacture and sale of intoxicating liquors authorized the sale and conveyance of the B. Schade Brewing Company to the defendant Spokane & Eastern Trust Company in the manner and form alleged by plaintiff, for the reason that it is contrary to the Charter of The B. Schade Brewing Company, in violation of the statutes of the State of Washington and of the individual rights of the minority nonconsenting stockholders. [81]

(6) The Court erred in dismissing plaintiff's and intervenor's complaint on the ground that the inability of the defendant, The B. Schade Brewing Company, to pay its debt to the Spokane & Eastern Trust Company authorized and empowered the president and secretary of the Brewing Company to convey all its property to the creditor company in the manner and form alleged, for the reason that it is contrary to the Charter of The B. Schade Brewing Company, in violation of the statutes of the State of Washington and of the individual rights of the

minority nonconsenting stockholders.

(7) The Court erred in dismissing plaintiff's and intervenor's complaint on the ground that no fraud was committed or contemplated in the execution and procurement of the deed and contract between the defendants The B. Schade Brewing Company and the Spokane & Eastern Trust Company, for the reason that the contract itself shows that the officers of The B. Schade Brewing Company were acting for their own interests in a manner destructive of the corporation itself and in violation of the rights of the minority nonconsenting stockholders.

(8) The Court erred in dismissing plaintiff's and intervenor's complaint on the ground that the mortgage from The B. Schade Brewing Company had been satisfied of record, for the reason that it is not material to the issues presented by plaintiff and intervenor and does not excuse or make right the wrong complained of.

(9) The Court erred in dismissing plaintiff's and intervenor's complaint on the ground that the mortgagee had been placed in possession by the mortgagor and the mortgage debt had not been paid, for the reason that it does not afford a justification for the continued possession of the property wrongfully procured or for a violation of the rights of the minority nonconsenting stockholders of the B. Schade Brewing Company.

(10) The Court erred in dismissing plaintiff's and intervenor's complaints on the ground that the utmost relief that could properly be granted to either The B. Schade Brewing Company or its stockholders

would be the right of redemption, for the reason that the contract and conveyance to the Spokane & Eastern Trust [82] Company was beyond the power and authority of the officers executing the same on behalf of The B. Schade Brewing Company, was invalid, in violation of the statutes of the State of Washington, and of the rights of the minority non-consenting stockholders, and in contemplation of law not the act of The B. Schade Brewing Company so that its original right of ownership and possession were not changed thereby.

(11) The Court erred in dismissing the plaintiff's and intervenor's complaints on the ground that it did not appear that either The B. Schade Brewing Company or its stockholders are ready and willing to pay the amount due on redemption, for the reason that it is not material, not an issue in this cause or a matter on which the rights of the plaintiff or the intervenor as stockholders depend or a question that could be adjudicated in this court and cause or that would effect the validity of the contract and conveyance complained of.

(12) The Court erred in dismissing plaintiff's and intervenor's complaints on the ground that the complaints are entirely devoid of equity, for the reasons stated in each of the foregoing assignments of error.

(13) The Court erred in the making and entry of that certain decree on the 3d day of November, 1920, absolutely dismissing plaintiff's and intervenor's complaints in this action, for the reason that the plaintiff and intervenor had the individual right to

bring the action and to the relief prayed for; also for all the reasons set forth in the foregoing assignments of error.

CALEB JONES,
Attorney for Plaintiff.
POST, RUSSELL & HIGGINS,
Attorneys for Intervenor.

[Endorsements]: Filed in the U. S. District Court,
Eastern District of Washington. May 2, 1921.
Wm. H. Hare, Clerk. By H. J. Dunham, Deputy.
[83]

In the District Court of the United States for
the Eastern District of Washington, Northern
Division.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE, and L. R. STRITESKY,

Defendants;

and

MUTUAL SECURITIES COMPANY, M. H. EG-
GLESTON and A. G. AVERY, as Executor,
Intervenors.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Erna Korn the plaintiff above named, and
the Mutual Securities Company, intervenor above

named, as principals, and United States Fidelity and Guaranty Company, of Baltimore, Maryland, surety, acknowledge ourselves to be jointly indebted to Spokane & Eastern Trust Company, The B. Schade Brewing Company, B. Schade and L. R. Stritesky, defendants and appellees in the above cause, in the sum of Three Hundred (300) Dollars, conditioned that, whereas, on the 3d day of November, A. D. 1920 in the District Court of the United States for the Eastern District of Washington, Northern Division, in a suit depending in that court, wherein Erna Korn, was plaintiff, and Spokane & Eastern Trust Company, The B. Schade Brewing Company, B. Schade and L. R. Stritesky, defendants, and Mutual Securities Company, M. H. Eggleston and A. G. Avery, as Executor, Intervenor, numbered on the equity docket as 3281, a decree was [84] rendered against the said Erna Korn, plaintiff, and the said Mutual Securities Company, intervenor, and having obtained an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said Spokane & Eastern Trust Company, The B. Schade Brewing Company, B. Schade and L. R. Stritesky, citing and admonishing each of them to be and appear at a session of the said United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the city of Seattle, State of Washington.

Now, if the said Erna Korn, plaintiff, and Mutual Securities Company, intervenor, shall prosecute their appeal to effect and answer all costs if they fail to

make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Dated April 20th, 1921.

ERNA KORN.
MUTUAL SECURITIES COMPANY,
By KARL DE LAITTRE,

President.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

[Seal]

By WILL A. KOMMERS,

Attorney in Fact.

The foregoing bond on appeal approved this 2d day
of May, A. D. 1921.

FRANK H. RUDKIN,
District Judge. [85]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 3281.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE, and L. R. STRITESKY,

Defendants;

MUTUAL SECURITIES COMPANY,

Intervenor.

Citation.

United States of America, to Spokane & Eastern Trust Company, The B. Schade Brewing Company, B. Schade, and L. R. Stritesky, GREETING:

You and each of you are hereby notified that in a certain case in equity in the United States District Court for the Eastern District of Washington, Northern Division, wherein Erna Korn appears as plaintiff, and Spokane and Eastern Trust Company, The B. Schade Brewing Company, B. Schade, and L. R. Stritesky, appear as defendants, and the Mutual Securities Company is intervenor, an appeal has been allowed the plaintiff and the intervenor therein to the United States Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be and appear in said court at San Francisco, California, thirty (30) days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable FRANK H. RUDKIN, Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, this 2d day of May A. D. 1921.

FRANK H. RUDKIN,
District Judge.

Attest: W. H. HARE,
Clerk. [86]

Service of the above citation, by copy thereof admitted this 2d day of May, A. D. 1921.

GRAVES, KIZER & GRAVES,
Attorneys for Defendant Spokane & Eastern Trust
Company.

MRS. B. SCHADE,
Vice-President the B. Schade Brewing Company.

MRS. B. SCHADE,
Executrix of the Estate of B. Schade, Deceased.
L. R. STRITESKY. [87]

In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.

No. 3281.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE, and L. R. STRITESKY,

Defendants;

MUTUAL SECURITIES COMPANY,

Intervenor.

Plaintiff's and Intervenor's Praecept for Transcript.

To W. H. Hare, Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, under

the appeal heretofore perfected, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Plaintiff's bill of complaint.
2. Subpoena served on defendants, with return of service.
3. Demurrer of defendant Spokane & Eastern Trust Company.
4. Order overruling demurrer of Spokane & Eastern Trust Company.
5. Stipulation between plaintiff and Spokane & Eastern Trust Company, dated March 24, 1920.
6. Answer of defendant Spokane & Eastern Trust Company.
7. Default of defendants The B. Schade Brewing Company, B. Schade, and L. R. Stritesky, for failure to appear or answer.
8. Notice and petition to intervene by Mutual Securities Company, M. H. Eggleston, and A. G. Avery, executor of the last will and testament of Robert Morrill, deceased. [88]
9. Order allowing intervention of Mutual Securities Company, and denying that of M. H. Eggleston and A. G. Avery, executor.
10. The Court's decision on dismissal of plaintiff's and intervenor's complaints.
11. Final decree of November 3, 1920.
12. Notice of lodgment of statement of facts and the time and place of motion for approval, and acceptance of service thereon.
13. Order approving statement of facts.

14. Statement of facts with all exhibits of plaintiff and intervenor and of defendant Spokane & Eastern Trust Company attached thereto.
15. Petition for appeal and order granting it.
16. Assignments of error.
17. Bond on appeal and approval thereof by Judge.
18. Original citation, with proof of service.
19. Plaintiff's praecipe for transcript and acceptance of service thereon.

To this transcript you will please attach the usual certificate of full transcript and citation with proof of service thereof, which we will send you in due time, and also certificate under seal showing costs of the record and by whom paid. Such transcript is to be prepared as required by law and rules of this court and the rules of the United States Circuit Court of Appeals at San Francisco, California, before thirty (30) days from the date of the citation.

CALEB JONES,

Attorney for Plaintiff.

POST, RUSSELL & HIGGINS,

Attorneys for Intervenor.

Service of the above praecipe by copy thereof admitted this 2d day of May, A. D. 1921.

GRAVES, KIZER & GRAVES,

Attorneys for Defendant Spokane & Eastern Trust Company.

MRS. B. SCHADE,

Vice-President of B. Schade Brewing Company.

MRS. B. SCHADE,

Executor of the Estate of B. Schade, Deceased.

L. R. STRITESKY. [89]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing typewritten pages to be a full, true correct and complete copy of so much of the record, papers, exhibits and other proceedings in the above and foregoing entitled cause as called for in the praecipe on appeal to the United States Circuit Court of Appeals and on file in the office of the clerk of said District Court, and that the same constitutes the record on appeal from judgment and decree of the District Court of the United States for the Eastern District of Washington to the Circuit Court of Appeals for the Ninth Judicial Circuit San Francisco, California.

I further certify that I hereto attach and hereto transmit the original citation issued in the cause.

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of Thirty-two (\$32.00) Dollars and that the said sum has been paid to me by Caleb Jones, solicitor for complainant and appellant.

In witness whereof I have hereunto set my hand and affixed the seal of said District Court at Spokane, Washington, in said district, this 27th day of May, 1921.

[Seal]

W. H. HARE,
Clerk. [90]

[Endorsed]: No. 3693. United States Circuit Court of Appeals for the Ninth Circuit. Erna Korn and Mutual Securities Company, a Corporation, Appellants, vs. Spokane & Eastern Trust Company, a Corporation, The B. Schade Brewing Company, a Corporation, B. Schade and L. R. Stritesky, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed May 31, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Plaintiff's Exhibit No. 1.

In the District Court of the United States, Eastern
District of Washington, Northern Division.

No.—.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE, and L. R. STRITESKY,
Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the defendant, the Spokane & Eastern Trust Company and the plaintiff, by and through their respec-

tive solicitors, that Erna Korn, if present in court at the trial of the above-entitled cause would testify as follows, to wit:

“That she has been informed and believes that the value of the matter in dispute between the plaintiff and defendants in this cause, is more than two hundred fifty thousand dollars.”

“That she is now and has been for more than ten years last past, a citizen and resident of the state of New York.”

“That during all the times mentioned in plaintiff’s bill of complaint, plaintiff has resided in New York City, New York, and had no notice or intimation of whatsoever kind, of the execution of that certain conveyance or deed mentioned in paragraph VII, of plaintiff’s bill of complaint, or of that certain agreement mentioned in paragraph VIII of plaintiff’s bill of complaint, and never consented or assented to the execution thereof, or became cognizant of their execution, until about the 1st day of June, 1919, when plaintiff was informed of the same by B. Schade; that plaintiff thereafter employed counsel in the premises.”

and that said statement of facts may be regarded as the testimony of the said Erna Korn, in her own behalf, and regarded as such by the Court at the trial of this cause hereafter to be had.

Dated this 6th day of April, A. D., 1920.

GRAVES, KIZER & GRAVES,
Solicitor, Spokane & Eastern Trust Co.
CALEB JONES,
Solicitor for Plaintiff.

[Endorsed]: No.—. In the District Court of the United States, Eastern District of Washington, Northern Division. Erna Korn, Plaintiff, vs. Spokane & Eastern Trust Co. et al., Defendants. Stipulation. Filed in the U. S. District Court, Eastern District of Washington. Oct. 18, 1920. W. H. Hare, Clerk.

No. 3693. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 31, 1921. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 2.

In the District Court of the United States, Eastern
District of Washington, Northern Division.

ERNA KORN,

Plaintiff,

vs.

**SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE and L. R. STRITESKY,**

Defendants.

NOTICE OF PENDENCY OF ACTION.

NOTICE IS HEREBY GIVEN that an action has been commenced in the District Court of the United States, Eastern District of Washington, Northern Division, at Spokane, Washington, by the above-named plaintiff against the above-named defendant for the purpose of having set aside and declared null and void that certain Warranty Deed from The B. Schade Brewing Company to the Spokane & Eastern Trust Company, made and executed

on the 24th day of January, 1918, and recorded in Book 355 of Deeds, at page 599 of the Records of Spokane County, State of Washington, and to have declared null and void that certain contract or agreement made and executed on the 24th day of January, 1918, by the said Spokane & Eastern Trust Company, a corporation, party of the first part, and The B. Schade Brewing Company, a corporation, party of the second part, which is recorded in Volume "Q," Record of Cont. of said County, on page 51.

That the premises mentioned in each of said instruments and affected by this suit are situated in the city and county of Spokane, State of Washington, and are described as follows, to wit:

"Blocks Sixteen (16) and Seventeen (17) of Resurvey of the Second Addition to Third Addition to Railroad Addition to Spokane. in Spokane, in Spokane County, Washington, as per plat thereof recorded in Book 'C' of Plats on page 79, in the office of the Auditor of said County, also that part of Ferry Street, vacated, more particularly described as follows, to wit: Beginning on the Northwest corner of Lot Twelve (12) in Block Seventeen (17) of Resurvey of Second Addition to Third Addition to Railroad Addition; thence running Easterly and along the Southerly side of Ferry Street to the Northeast Corner of Lot One (1) in Block Seventeen (17) of said Addition; running thence northerly to a point *eight* (80) feet; thence running Westerly and along the North side of Ferry Street to the Southwest corner of Lot Four (4) in Block

sixteen (16) of said Addition; thence in a Southwesterly direction and along Sheridan Street to the Northwestern corner of said Lot Twelve (12) in said Block Sixteen (16), being the place of beginning.

“Also that part of the vacated alley in said Block Seventeen (17), more particularly described as follows, to wit: Beginning on the Northwest corner of Lot Thirteen (13) in Block Seventeen (17) of Second Addition to Railroad Addition to Spokane, running thence East and along the Southerly side of said alley to the Northeast corner of Lot Thirty (30) of said Block Seventeen (17) and to the West side of Hatch Street; running thence North along the West side of Hatch Street Fifteen (15) feet to a point; thence running West along the Northerly side of said alley to the Southwest corner of Lot Twelve (12) in said Block Seventeen (17) of said Addition; running thence South along the East side of Sheridan Street, Fifteen (15) feet to the place of beginning;

“Excepting from the above-described premises the property appropriated by the Spokane Terminal Company, a corporation, by decree dated September 7, 1905, entered in Journal 93 on page 81, and recorded in the Auditor's office in Book 166 of Deeds on page 156; and excepting from the above described premises the property appropriated by the Northern Pacific Railway Company, by decree dated November 7, 1905, recorded in Journal 93, on Page 202, and

recorded in the office of the Auditor of Spokane County, in Book 165 of Deeds on page 421.

“And including as far as they now are or may hereafter belong to or be used with the building on the said premises, all elevators, heating and ventilating apparatus, all gas, electric light and other fixtures, and all machinery and mechanical appliances of every kind and character, now or hereafter placed in the brewing and bottling plants of said grantor, with all other fixtures and appliances therein used as a part of said brewing and bottling plants, together with all privileges, hereditaments and appurtenances thereunto now or hereafter belonging or otherwise appertaining, and the rents, issues and profits arising therefrom; it being the intention of the grantor to convey hereby the lands above described, with the brewing and bottling plants thereon, with the trade fixture and appliances therein contained, as an entirety.”

CALEB JONES,
Attorney for Plaintiff.

[Endorsed]: No. 562726. In the District Court of the United States, Eastern District of Washington, Northern Division. Erna Korn, Plaintiff, vs. Spokane & Eastern Trust Company, et al., Defendants. Notice of Pendency of Action. Filed in the U. S. District Court, Eastern District of Washington. Oct. 18, 1920. W. H. Hare, Clerk.

No. 3693. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 31, 1921. F. D. Monckton, Clerk.

State of Washington,
County of Spokane,—ss.

This is to certify that this instrument was filed for record in the office of the Auditor of Spokane County at the request of C. Jones on this Aug. 16, 1919, at 11:40 A. M. and recorded in volume "N," Records of Tr. of Judge, of said County on page 258.

J. A. STEWART,
County Auditor.

Van N. Murphy, Deputy.

Recorded Aug. 22, 1919.

By ARNOLD C. HINTZ,
Deputy.

Fee, \$1.30.

Plaintiff's Exhibit No. 3.

In the District Court of the United States, for the
Eastern District of Washington, Northern Division.

ERNA KORN,

Plaintiff,

vs.

SPOKANE & EASTERN TRUST COMPANY,
THE B. SCHADE BREWING COMPANY,
B. SCHADE and L. R. STRITESKY,
Defendants.

STIPULATION.

IT IS STIPULATED AND AGREED by and between counsel for the respective parties, that the defendant, the Spokane & Eastern Trust Company,

may sell and convey that certain large Ice Machine, complete, with all tools, equipment and accessories thereunto belonging, for a consideration of Twelve Thousand (\$12,000) Dollars, to A. E. Edwards, of Seattle, Washington, it being a part of the personal property, mentioned in that certain deed and agreement referred to in plaintiff's bill of complaint in this cause, and the proceeds of such sale shall be held in trust in lieu of said property, and subject to the decree of this court in the same way as though said property had not been converted into cash. That the foregoing stipulation is entered into without prejudice to either of the parties to this action.

Dated this 23d day of April, 1920.

CALEB JONES,

Attorney for Plaintiff.

GRAVES, KIZER, and GRAVES,

Attorneys for Defendant S. & Eastern Trust Company.

[Endorsed]: No. ——. In the District Court of the United States for the Eastern District of Washington, Northern Division. Erna Korn, Plaintiff, vs. Spokane & Eastern Trust Co., et al., Defendants. Stipulation. Filed in the U. S. District Court, Eastern District of Washington, Oct. 18, 1920. W. H. Hare, Clerk.

No. 3693. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 31, 1921. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 4.

In the Superior Court of the State of Washington,
in and for the County of Spokane.

No. 55,148.

STATE FINANCE COMPANY, a Corporation,
Plaintiff,

vs.

B. SCHADE BREWING COMPANY, a Corpora-
tion, B. SCHADE and SOPHIA SCHADE,
His Wife,

Defendants.

AMENDED COMPLAINT.

Plaintiff complains and for cause of action alleges:

1. That plaintiff is now and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and has paid its annual license tax last due to the State of Washington.

2. That the defendant B. Schade Brewing Company is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business in the City of Spokane, Spokane County, Washington.

3. That the defendants B. Schade and Sophia Schade now are and at all times herein mentioned have been husband and wife, and on the dates when the notes herein described were executed were the owners as community property of stock in the de-

fendant B. Schade Brewing Company, a corporation.

4. That the obligation hereinafter alleged to have been incurred by said B. Schade was incurred by him on behalf of and for the benefit of the community consisting of said Sophia Schade and B. Schade, defendants, in consideration of the benefits to be derived by said community as stockholders in said defendant company on account of said loan and in consideration of the original consideration passing to said defendant corporation, and in consideration of the several extensions or renewals of said notes.

5. That on the dates hereinafter mentioned, defendant B. Schade Brewing Company, a corporation, made, executed and delivered to the Spokane & Eastern Trust Company its certain promissory notes in writing in the amounts, with the due dates and bearing interest as follows:

Date.	Amount.	When Due.	Interest.
Aug. 10, 1914	\$5,000	Nov. 10, 1914	7% from maturity.
" 10, 1914	5,000	" 10, 1914	7% " "
" 10, 1914	10,000	" 10, 1914	7% " "
Sept. 4, 1914	15,000	Dec. 4, 1914	8% " "
" 4, 1914	5,000	" 4, 1914	8% " "
Oct. 3, 1914	5,000	Jan. 2, 1915	8% " "
" 3, 1914	5,000	" 2, 1915	8% " "

And the payment of the principal, interest and attorneys' fees provided for in said notes and each of them was at the date of their execution guaranteed by said B. Schade personally and on behalf of the community consisting of B. Schade and Sophia Schade, his wife.

6. That on the dates when said notes above set forth became due, renewal notes therefor of like tenor and effect were executed and delivered by said defendant B. Schade Brewing Company and B. Schade to said Spokane & Eastern Trust Company, as follows:

Date.	Amount.	When Due.	Interest.
Nov. 10, 1914	\$15,000	Feb. 10, 1915	8% from maturity.
" 10, 1914	5,000	" 10, 1915	8% " "
Dec. 4, 1914	20,000	Mar. 4, 1915	12% " "
Jan. 2, 1915	10,000	Apr. 3, 1915	12% " "

7. That on the dates when said notes last above described became due, renewal notes therefor of like tenor and effect were executed and delivered by said B. Schade Brewing Company and B. Schade to said Spokane & Eastern Trust Company, as follows:

Date.	Amount.	When Due.	Interest.
Feb. 10, 1915	\$5,000	May 10, 1915	7% from maturity.
" 10, 1915	15,000	" 10, 1915	12% " "
Mar. 4, 1915	20,000	June 4, 1915	12% " "
Apr. 3, 1915	10,000	July 3, 1915	12% " "

8. That on the dates when said notes last above described became due, renewal notes therefor of like tenor and effect were executed and delivered by said B. Schade Brewing Company and B. Schade to said Spokane & Eastern Trust Company, as follows:

Date.	Amount.	When Due.	Interest.
May 10, 1915	\$15,000	Aug. 10, 1915	12% from maturity.
" 10, 1915	5,000	" 10, 1915	7% " "
June 4, 1915	20,000	Sept. 4, 1915	12% " "
July 3, 1915	10,000	Oct. 3, 1915	12% " "

9. That on the dates when the notes executed on May 10, 1915, and June 4, 1915, became due, renewal notes therefor were executed by said B.

Schade Brewing Company and B. Schade, as follows:

	Date.	Amount.	When Due.	Interest.
Aug.	10, 1915	\$15,000	Nov. 10, 1915	12% from maturity.
"	10, 1915	5,000	" 10, 1915	7% " "
Sept.	4, 1915	20,000	Dec. 4, 1915	12% " "

10. That on April 3, 1916, defendants B. Schade Brewing Company and B. Schade in renewal of the notes executed and delivered on July 3, 1915, August 10, 1915, and September 4, 1915, made, executed and delivered to the Spokane & Eastern Trust Company their certain promissory notes in the words and figures as follows, to wit:
\$25,000.

Spokane, Washington, April 3rd, 1916.

One year after date, without grace, for value received, I promise to pay to the order of Spokane & Eastern Trust Company, at the office of said company, Spokane, Washington, Twenty-five Thousand and no/100 Dollars in Gold Coin of the United States of America, with interest at 8 per cent per annum, from date, until maturity, and one per cent. per month from maturity until paid, payable quarterly in advance and if any part of this note or interest be not paid when due, it shall cause the whole to become due and payable at once, without further notice. I will also pay to the holder any expense to which it may be put in the collection or attempted collection of principal or interest. In case action is brought to collect this note, I agree that the venue of such action may be laid in Spokane County, Washington, and that the action may be there maintained without regard to the residence of defend-

ants, and that in any action brought hereupon I will pay such sum as the court may adjudge reasonable as attorney's fees. Each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment thereof, and declares himself bound thereon as a principal and not as a surety.

B. SCHADE BREWING COMPANY,

By W. J. MRAZ,

Vice-President.

By L. R. STRITESKY,

Secretary.

Renewal note secured by mortgage.

Postoffice Address: ———.

For cause received, I hereby guarantee the payment of the principal of within note, and the interest and attorney's fees therein provided for, at maturity, and at any time thereafter, until paid, and I hereby waive demand of payment, presentation for payment, notice of nonpayment, and notice of protest. This guarantee is absolute, and the payee upon default may, at its election proceed immediately against the guarantor or, at its option against the guarantor and principal debtor jointly or severally.

I hereby agree that the venue of any suit brought hereon may be laid in Spokane County, Washington, at the option of the holder hereof.

(Signed) B. SCHADE.

\$25,000.00. Spokane, Washington, April 3, 1916.

One year after date, without grace, for value received, I promise to pay to the order of Spokane &

Eastern Trust Company, at the office of said company, Spokane, Washington, Twenty-five Thousand and no/100 Dollars in Gold Coin of the United States of America, with interest at 8 per cent per annum from date until maturity, and one per cent per month from maturity until paid, payable quarterly, in advance, and if any part of this note or interest be not paid when due, it shall cause the whole to become due and payable at once, without further notice. I will also pay to the holder any expense to which it may be put in the collection or attempted collection of principal or interest. In case action is brought to collect this note, I agree that the venue of such action may be laid in Spokane County, Washington, and that the action may be there maintained without regard to the residence of defendants, and that in any action brought hereupon I will pay such sum as the court may adjudge reasonable as attorney's fees. Each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of nonpayment thereof, and declares himself bound thereon as a principal and not as a surety.

B. SCHADE BREWING COMPANY.

By W. J. MRAZ,
Vice-President.

By L. R. STRITESKY,
Secretary.

Renewal note secured by mortgage.

Postoffice Address: Box 1685, City.

For value received, I hereby guarantee the payment of the principal of within note, and the interest

and attorney's fees therein provided for, at maturity, and at any time thereafter, until paid, and I hereby waive demand of payment, presentation for payment, notice of nonpayment, and notice of protest. This guarantee is absolute, and the payee upon default may, at its election, proceed immediately against the guarantor or, at its option, against the guarantor and principal debtor jointly or severally.

I hereby agree that the venue of any suit brought hereon may be laid in Spokane County, Washington, at the option of the holder hereof.

(Signed) B. SCHADE.

Which said guarantee above set forth and so signed by said B. Schade was signed on his own behalf and on behalf and for the benefit or the community consisting of said B. Schade and Sophia Schade, his wife.

11. That on October 5, 1914, said B. Schade Brewing Company, defendant, for the purpose of securing the payment of Fifty Thousand (\$50,000) Dollars then owing by it to the said Spokane & Eastern Trust Company, and evidenced by certain notes aggregating said sum and then unmatured, as above set forth, and for the purpose of securing any renewal notes that might be given in place of said notes then in force, executed and delivered to the Spokane & Eastern Trust Company its certain indenture of mortgage, a full, true and correct copy of which said mortgage is hereunto attached marked Exhibit "A," and made a part of this amended complaint.

12. That when said mortgage became due on October 3, 1915, said defendants B. Schade Brewing

Company, B. Schade and Sophia Schade represented to said Spokane & Eastern Trust Company that said defendants B. Schade Brewing Company, said B. Schade and Sophia Schade were unable to pay said notes or said mortgage and no steps were taken by said Spokane & Eastern Trust Company towards the foreclosure of said mortgage or action upon said notes, and on April 3, 1916, the time for the payment of said mortgage was extended to April 3, 1917.

13. That said notes and mortgage have been heretofore transferred and delivered by said Spokane & Eastern Trust Company to the plaintiff herein, and plaintiff is now the lawful owner and holder of the same.

14. That no part of the principal of said notes has been paid, but the interest has been paid on the same to July 3, 1916, and no further, and there is now due and owing to the plaintiff on account of said notes and mortgage the sum of Fifty Thousand (\$50,000) Dollars with interest thereon at eight per cent per annum from July 3, 1916.

15. That said mortgagors wholly neglected and refused to pay insurance premiums upon policies of insurance upon the premises herein mortgaged, and plaintiff herein and its predecessors in interest in order to protect their security were compelled to pay and did pay the following sums on account of insurance premiums on said premises, to wit:

December 1, 1916.....	\$ 93.75
December 1, 1916.....	100.25
December 1, 1916.....	37.50
January 19, 1917.....	29.25

May 10, 1917.....	45.00
May 10, 1917.....	29.25
May 10, 1917.....	38.15
November 2, 1917.....	169.40

which said items, according to the terms of said mortgage, bear interest at the rate of twelve per cent per annum from their respective dates of payment by said mortgagee.

16. That the sum of Twenty-five Hundred (\$2500.00) Dollars is a reasonable sum to be allowed plaintiff as an attorneys' fee in this action.

WHEREFORE, plaintiff prays for a decree that there is now due and owing it on account of said mortgage the sum of Fifty Thousand (\$50,000) Dollars with interest at eight per cent per annum from July 3, 1916; the sum of \$237.50 with interest thereon from December 1, 1916, at twelve per cent per annum; the sum of 29.25 with interest thereon at twelve per cent per annum from January 19, 1917; the sum of \$85.15 with interest thereon at twelve per cent per annum from May 10, 1917, the sum of \$29.25 with interest thereon at twelve per cent per annum from May 19, 1917, and the sum of \$169.40 with interest thereon at twelve per cent per annum from November 2, 1917, together with \$2,500.00 attorneys' fees and costs of suit.

That the usual decree may be made for the sale of said mortgaged premises in the manner provided by law, and that the proceeds arising therefrom be applied toward the payment of the amounts found due to the plaintiff aforesaid; that the defendants and each of them and all persons claiming from, through

or under them, and all persons claiming to have acquired any interest in or lien upon the said mortgaged premises subsequent to the execution of said mortgage may be forever barred and foreclosed of and from all right, title, interest, estate, claim, lien, and equity of redemption in and to or upon the said mortgaged premises and every part thereof; that plaintiff have judgment against defendants B. Schade Brewing Company, B. Schade and the community consisting of B. Schade and Sophia Schade, husband and wife, for any deficiency which may remain after applying all the proceeds of said sale properly applicable to the satisfaction of said judgment; that the plaintiff herein be authorized and directed to forthwith enter into and upon the premises hereinbefore described and take possession thereof, and apply the rent, issues and profits thereof upon the indebtedness hereby secured, and that an accounting be had of the same from the date of the maturity of said indebtedness as provided in said mortgage; that plaintiff or any other party to this suit may become a purchaser or purchasers at said sale, and that the purchaser be let into possession of said premises upon production of Sheriff's Certificate of Sale, and that plaintiff be given such other, further and different relief as to the court may seem just.

McCARTHY & EDGE,
Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

Lester P. Edge, being first duly sworn, on oath

deposes and says: That he is one of the attorneys for plaintiff in the above-entitled action and makes this verification for and on its behalf; that the above action is founded on written instruments for the payment of money only, which said instruments are in the possession of affiant; that he has read the above and foregoing amended complaint, knows the contents thereof, and that the allegations therein contained are true.

LESTER P. EDGE.

Subscribed and sworn to before me this 2d day of November, 1917.

JOSEPH McCARTHY,
Notary Public for Washington, Residing at Spokane, Wash.

EXHIBIT "A."

The grantor, the B. Schade Brewing Company, a corporation organized and existing under the laws of the State of Washington, for and in consideration of the sum of Fifty Thousand (\$50,000.00) Dollars, in hand paid, conveys and warrants to the Spokane and Eastern Trust Company, a corporation organized and existing under the laws of the State of Washington, the following described real estate situate in the County of Spokane, State of Washington, to wit:

Blocks Sixteen (16) and Seventeen (17) of Resurvey of the Second Addition to Third Addition to Railroad Addition to Spokane, in Spokane County, Washington, as per plat thereof recorded in Book "C" of Plats on page 79, in the office of the Auditor of said county, also that part of Ferry

Street vacated, more particularly described as follows, to wit: Beginning on the Northwest corner of Lot Twelve (12) in Block Seventeen (17) of Resurvey of Second Addition to Third Addition to Railroad Addition; thence running easterly and along the southerly side of Ferry Street to the Northeast corner of Lot One (1) in Block Seventeen (17) of said Addition; running thence northerly to a point eighty (80) feet; thence running westerly and along the north side of Ferry Street to the Southwest corner of Lot Four (4) in Block Sixteen (16) of said Addition; thence in a Southwesterly direction and along Sheridan Street to the Northwest corner of said Lot Twelve (12) in said Block Sixteen (16), being the place of beginning.

Also that part of the vacated alley in said Block Seventeen (17), more particularly described as follows, to wit: Beginning on the Northwest corner of Lot Thirteen (13) in Block Seventeen (17) of Second Addition to Third Addition to Railroad Addition to Spokane, running thence east and along the southerly side of said alley to the Northeast corner of Lot Thirty (30) of said Block Seventeen (17) and to the West side of Hatch Street; running thence North along the West side of Hatch Street Fifteen (15) feet to a point, thence running West along the Northerly side of said alley to the Southwest corner of Lot Twelve (12) in said Block Seventeen (17) of said Addition; running thence South and along the east side of Sheridan Street, Fifteen (15) feet to the place of beginning.

Excepting from the above described premises the

property appropriated by the Spokane Terminal Company, a corporation, by decree dated September 7, 1905, entered in Journal 93, on page 81, and recorded in the Auditor's office in Book 166 of Deeds on page 156; and excepting from the above described premises the property appropriated by the Northern Pacific Railway Company, by decree, dated November 7, 1905, recorded in Journal 93, page 202, and recorded in the office of the Auditor of Spokane County, in Book 165 of Deeds on page 421.

And including as far as they now are or may hereafter belong to or be used with the building on the said premises, all elevators, heating and ventilating apparatus, all gas, electric light and other fixtures, and all machinery and mechanical appliances of every kind and character, now or hereafter placed in the Brewing and Bottling plants of said grantor, with all other fixtures and appliances therein used as a part of said Brewing and Bottling plants, together with all privileges, hereditaments and appurtenances thereunto now or hereafter belonging or otherwise appertaining, and the rents, issues and profits arising therefrom; it being the intention of the grantor to convey hereby the lands above described, with the brewing and bottling plants thereon, with the trade fixture and appliances therein contained, as an entirety.

This instrument is intended as a mortgage to secure the performance of the covenants hereinafter stipulated and to secure the payment of three certain

promissory notes made by the grantor, in favor of the grantee, as follows:

One note for Ten Thousand (\$10,000.00) Dollars, dated October 3rd, 1914, due ninety days after date. One note for Twenty-Thousand (\$20,000.00) Dollars, dated August 10, 1914, due ninety days after date, one note for Twenty Thousand (\$20,000.00) Dollars, dated September 4, 1914, due ninety days after date. All of said notes draw interest at the rate of eight per cent per annum, payable quarterly in advance; it being understood that said notes will be renewed upon the same terms, as they fall due, from time to time, for the period of one year from October 3, 1914, it being the intention that such renewal shall not extend the date of payment beyond October 3, 1915, and that the whole of said indebtedness shall be due and payable on that date.

It is further agreed and understood between the parties hereto that if the said Spokane and Eastern Trust Company shall loan any further sum or sums of money to the grantor, in addition to the Fifty Thousand (\$50,000.00) Dollars herein specifically mentioned, this mortgage shall stand as security for such additional advances, and the said Spokane and Eastern Trust Company shall be entitled, as to such additional advances, to all of the rights and remedies herein provided as to the said sum specifically mentioned.

NOW THEREFORE, if the grantor shall pay the said principal and interest as in said notes provided and shall also keep and perform all and singular the covenants and agreements hereinafter con-

tained on the grantor's part to be kept and performed, then this deed shall be null and void, otherwise to be and remain in full force and effect.

The grantor further covenants and agrees with the grantee as follows:

1. That the grantor will pay the sums of money as above specified and the interest thereon.

2. That at all times during the continuance of this mortgage and until said mortgage shall be fully paid or released the grantor will keep the buildings and other property covered by this mortgage on said premises unceasingly insured against loss by fire in such first-class, responsible stock insurance company or companies as shall be satisfactory to the grantee, for at least the sum of Thirty-one thousand nine hundred (\$31,900.00) Dollars, payable in case of loss to the grantee, to the amount then secured by this mortgage, with a mortgagee and subrogation clause satisfactory to the grantee, attached to such policy or policies of insurance; that if a greater amount of insurance is placed upon said buildings then the amount aforesaid, all such insurance shall be made payable in case of loss as aforesaid, and with like subrogation clause, and that all of said insurance policies shall be at all times deposited with the grantee, and that all premiums on all of the policies of insurance shall be promptly paid when due. In case of loss and payment by any insurance company, the amount of the insurance money paid shall be applied either on the indebtedness secured hereby or in rebuilding or restoring the damaged buildings as the grantee may elect.

3. That the grantor hereby agrees to pay all taxes and assessments, general or special, which may be assessed upon the said land, premises or property, or upon the interest of the grantee therein; or upon this mortgage or the money secured hereby; without regard to any law heretofore enacted or hereafter to be enacted, imposing payment of the whole or any part thereof, upon the grantee, that upon violation of this undertaking or the passage by the state of a law imposing payment of the whole or any portion of any of the taxes aforesaid upon the grantee, or upon the rendering by any court of competent jurisdiction of a decision that the undertaking by the grantor as herein provided, to pay any taxes or assessments, is legally inoperative, then, and in any such event, the debt hereby secured, without deduction, shall, at the option of the grantee become immediately due and collectible, notwithstanding anything contained in this mortgage or any law hereafter enacted. The grantor further agrees not to suffer or permit all or any part of said taxes or assessments to become or remain delinquent, nor to permit the said property or any part thereof, or any interest therein, to be sold for taxes, and further agrees to furnish annually to the grantee, on or before the fifteenth day of November, the certificate of the proper authority, showing full payment of all such taxes and assessments.

4. That in case the grantor shall fail to keep in force insurance on the mortgaged property as hereinbefore provided, or shall fail to pay all or any

part of the taxes or assessments which may be levied or assessed against the mortgaged property or the indebtedness secured hereby, or any interest of the grantee, either in said mortgaged premises or the indebtedness secured hereby, the grantee, may, at its option, procure said insurance and pay said taxes and assessments, or redeem the property from tax sale, if it has been sold, and the grantor agrees to repay to the grantee any and all sums which it may have paid or for which it shall have become obligated in procuring said insurance or paying said taxes, or redeeming said property from any tax sale, together with interest at twelve per cent. per annum from the date the same shall have been paid, and the same may be recovered by suit, and this mortgage shall stand as security therefor. In case the grantee elects to advance insurance premiums or taxes, the receipt of an official of the insurance company in which such insurance is placed, shall, with respect to any such insurance premiums, be conclusive evidence as between the parties to this mortgage of the amount and the fact of payment thereof, and the receipt of the proper public official shall, with respect to the taxes or assessments, be conclusive evidence as between the parties to this mortgage of the amount and validity and the fact of payment thereof.

5. That the grantor will pay to the grantee any and all sums, including costs, expenses and reasonable attorney's fees which it may incur or expend in any proceedings, legal or otherwise, to sustain the lien of this mortgage or its priority or in defend-

ing against the liens or claims of any person or persons asserting priority to this mortgage, or in the discharge of any such claim or lien, or in connection with any suit at law or in equity to foreclose this mortgage or to recover any indebtedness hereby secured, or for an abstract or an extension of abstract of title of the mortgaged premises, together with interest on such sums at twelve per cent. per annum until paid, and this mortgage shall stand as security therefor.

6. That if default is made in the payment of all or any part of the principal or interest hereby secured at the time and place provided in the note hereinbefore referred to or in this mortgage, or if default be made in the payment of any additional sums or sums advanced to the grantor by the grantee when and as the same shall be due and payable, or if the grantor shall suffer or permit waste to be committed on the mortgaged premises, or any mechanic's or other liens arising either by contract or law which might be prior in time to the lien of this mortgage to be created or rest upon all or any part of said mortgaged premises, for ten days, without paying the same, or procuring the release and discharge of said premises from said lien; or shall make default in the full performance of each, any or all the stipulations and covenants of this mortgage, or in case there shall exist upon the premises mortgaged herein any claim, lien or incumbrance prior to this mortgage, then and in each and every such case the entire principal sum secured by this mortgage, with all interest accrued thereon and all amounts secured

by this mortgage, shall, at the option of the grantee, be and become at once due and payable, and may at any time thereafter be collected by suit at law, foreclosure of the mortgage or any other proper, legal or equitable proceeding, without declaration of said option or other or further notice.

7. That no failure of the grantee to exercise any option to declare the maturity of the debt hereby secured under the foregoing conditions shall be taken or deemed as a waiver of the right to exercise such option or declare such forfeiture, either as to any past or present default on the part of the grantor, and the procurement of the insurance or payment of the taxes, assessments or liens by the grantee, as hereinbefore provided, shall not be taken or deemed as a waiver of the right of it to declare the maturity of the indebtedness hereby secured, by reason of the failure of the grantor to procure such insurance or pay such taxes, assessments or liens.

8. That upon the maturity of the indebtedness hereby secured, either by lapse of time or by reason of any default on the part of the grantor, as hereinbefore provided, the grantee shall have the right to forthwith enter into and upon the premises hereinbefore described and take possession thereof and apply the rents, issues and profits thereof upon the indebtedness hereby secured; that the rents, issues and profits of all and every part of the mortgaged premises are hereby specifically pledged to the payment of the indebtedness hereby secured, and all obligations which may accrue against the grantor under the terms of this mortgage or the indebtedness hereby secured, and that upon the maturity of

this indebtedness, either by lapse of time or by default on the part of the grantor, the grantee may proceed at once to foreclose this mortgage, to enforce the payment of the indebtedness and all obligations hereby secured.

9. That if the proceeds of any sale under this mortgage shall not be sufficient to pay the costs and expenses of such foreclosure and sale, including a reasonable attorney's fee, and to pay all moneys, advances, interests and costs secured by this mortgage, then the grantor covenants to pay such deficiency, and a deficiency judgment for such amount may be entered up forthwith without notice, and the decree of foreclosure shall provide that the balance due and costs which may remain unsatisfied after such sale shall be satisfied from any other property of the grantor and execution may be issued therefor and levy made thereunder upon such property or any part thereof.

10. That all of the covenants and agreements herein contained, to be kept and performed on the part of the grantor, shall apply to, and be binding upon, in like manner, the successors and assigns of said grantor.

IN WITNESS WHEREOF, the said grantor has caused these presents to be executed by its president and secretary, and its seal attached, this 5th day of October, A. D. 1914.

B. SCHADE BREWING COMPANY,

By B. SCHADE,

Its President.

Attest: L. R. STRITESKY,

Its Secretary.

State of Washington,
County of Spokane,—ss.

On this 6th day of October, A. D. 1914, before me personally appeared B. Schade and L. R. Stritesky, to me known to be respectively the president and secretary of the B. Schade Brewing Company, the corporation that executed the within instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal thereto affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

J. M. GERAGHTY,
Notary Public for the State of Washington, Residing
at Spokane, Wn.

Rec'd copy of the within amended complaint this
2d day of November, 1917.

O. C. MOORE,
R. P. W.,
Attorney for Defendants.

Filed Nov. 17, 1917, at 9:35 o'clock A. M. Glen
B. Creighton, Clerk. W. C. Steinmetz, Deputy.

STATE FINANCE COMPANY, a Corp.,
Plaintiff,

vs.

B. SCHADE BREWING COMPANY, a Corpor-
ation, et al.,
Defendants.

State of Washington,
County of Spokane,—ss.

No. 55,148.

CERTIFICATE.

I, Emery P. Gilbert, Clerk of the Superior Court of the State of Washington, for the County of Spokane, do hereby certify that the above and foregoing is a true and correct copy of the Amended Complaint, in the above-entitled cause, as the same now appears on file and of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 24th day of June, 1920.

[Seal]

EMERY P. GILBERT,
Clerk.

By Harry C. Clark,
Deputy.

[Endorsed]: Filed in the U. S. District Court. Eastern District of Washington. Oct. 18, 1920. W. H. Hare, Clerk.

No. 3693. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 31, 1921. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 5.

In the Superior Court of the State of Washington,
in and for the County of Spokane.

No. 55,148.

STATE FINANCE COMPANY, a Corporation,
Plaintiff,

vs.

B. SCHADE BREWING COMPANY, a Corpor-
ation, B. SCHADE and SOPHIA SCHADE,
His Wife,

Defendants.

ANSWER.

Come now B. Schade and Sophia Schade, his wife,
two of the defendants, and for answer to the amended
complaint in the above-entitled action admit, deny
and allege as follows, to wit:

1. Admit paragraph 1 of said amended complaint.
2. Admit paragraph 3 of said amended complaint.
3. Admit the matters and things set forth and
alleged in paragraph 3 of said amended complaint.
4. Deny the matters and things set forth and
alleged in paragraph 4 of said amended complaint.
5. Admit the matters and things set forth and
alleged in paragraph 5 of said amended complaint,
except that defendants deny that defendant B.
Schade guaranteed said notes, either or any of them,
on behalf or for the benefit of the community, con-
sisting of B. Schade and Sophia Schade, his wife,
and allege that said notes were executed and given

in payment of other and pre-existing notes aggregating said sum of \$50,000.00.

6. Admit the execution by defendant B. Schade Brewing Company, a corporation, of the notes referred to and partially described in paragraph 6 of said amended complaint, but deny that said notes were of like tenor and effect with the notes alleged in paragraph 5 of said amended complaint; deny that said notes are of like tenor and effect with the notes described in said mortgage; deny that same were given in renewal of the notes alleged in paragraph 5 of said amended complaint or in renewal of the notes described in said mortgage, and deny each and every matter and thing set forth in paragraph 6 not herein specifically admitted.

7. Admit the execution by defendant B. Schade Brewing Company, a corporation, of the notes referred to and partially described in paragraph 7 of said amended complaint, but deny that said notes were of like tenor and effect with the notes alleged in paragraph 6 of said amended complaint; deny that said notes are of like tenor and effect with the notes described in said mortgage; deny that same were given in renewal of the notes alleged in paragraph 6 of said amended complaint or in renewal of the notes described in said mortgage, and deny each and every matter and thing set forth in paragraph 7 not herein specifically admitted.

8. Admit the execution by defendant B. Schade Brewing Company, a corporation, of the notes referred to and partially described in paragraph 8 of said amended complaint, but deny that said notes

were of like tenor and effect with the notes alleged in paragraph 7 of said amended complaint; deny that said notes are of like tenor and effect with the notes described in said mortgage; deny that same were given in renewal of the notes alleged in paragraph 7 of said amended complaint or in renewal of the notes described in said mortgage, and deny each and every matter and thing set forth in paragraph 8 not herein specifically admitted.

9. Admit the execution by defendant B. Schade Brewing Company, a corporation, of the notes referred to and partially described in paragraph 9 of said amended complaint, but deny that said notes were of like tenor and effect with the notes alleged in paragraph 8 of said amended complaint; deny that said notes are of like tenor and effect with the notes described in said mortgage; deny that same were given in renewal of the notes alleged in paragraph 8 of said amended complaint or in renewal of the notes described in said mortgage, and deny each and every matter and thing set forth in paragraph 9 not herein specifically admitted.

10. Deny the matters and things set forth and alleged in paragraph 10 of said amended complaint except that defendants admit that the guaranty clauses on the instrument therein set forth were signed by said defendant B. Schade under the circumstances and conditions hereinafter alleged and not otherwise.

11. Admit the execution and delivery by defendant B. Schade Brewing Company, a corporation, to the Spokane & Eastern Trust Company of the mort-

gage referred to in paragraph 11 of said amended complaint, a copy of which is attached thereto as Exhibit "A," and deny that said mortgage was given to secure the payment of the notes, or any of the notes, alleged and described in said amended complaint, and deny each and every other matter and thing alleged in said paragraph 11 not herein specifically admitted.

12. Deny the matters and things set forth and alleged in paragraph 12 of said amended complaint.

13. Deny any knowledge or information sufficient to form a belief as to the matters and things set forth and alleged in paragraph 13 of said amended complaint.

14. As to paragraph 14 of said amended complaint, deny that there is due or owing to the plaintiff on account of said notes and mortgage or either or any thereof, the sum of \$50,000, with interest thereon at 8% per annum from July 3, 1916, or any other sum or amount whatever.

15. As to paragraph 15 of said amended complaint, deny any knowledge or information sufficient to form a belief as to whether the plaintiff and its predecessors in interest, or either of them, paid any portion or part of the insurance premiums alleged in said paragraph 15 to have been paid by them.

16. Deny that the sum of \$2500 or any other sum or amount whatever is a reasonable sum to be allowed to plaintiff as an attorney's fee in this action.

For a further separate and affirmative defense to said amended complaint these defendants allege:

I.

That the promissory notes alleged, referred to and partially described in paragraphs 5, 6, 7, 8 and 9 of said amended complaint were, before the institution of this suit, fully paid, satisfied, cancelled, discharged and surrendered to defendant B. Schade Brewing Company.

For a further second and separate defense to said amended complaint these defendants allege:

I.

That the plaintiff herein, State Finance Company, a corporation, did not take and does not now hold the mortgage described in said amended complaint nor the notes thereby secured as a *bona fide* purchaser in due course before maturity for a valuable consideration, but that whatever right, title, claim or interest it has in said mortgage, or any obligation thereby secured, was acquired as the agent of said Spokane & Eastern Trust Company for the purpose of collection only after maturity with full knowledge of all the circumstances concerning the relations between the said Spokane & Eastern Trust Company and defendant B. Schade Brewing Company, and with full knowledge of all the circumstances and conditions surrounding the execution of the various instruments alleged and described in the amended complaint herein.

II.

That on and for a long time prior to the 3d day of April, 1916, defendant B. Schade was and had been suffering from mental impairment, brought on and induced by a complication of serious physical ail-

ments, in consequence of which he was, at the time of signing his name to the guaranty clauses attached to the notes set forth and alleged in paragraph 10 of said amended complaint, mentally irresponsible and incapable of intelligently comprehending or performing and executing any contract or other legal obligation; that in consequences of said illness and defective mental state, he was easily influenced and readily to be dissuaded and induced to act on the suggestion of other persons, and that he subscribed his name to said guaranty clauses aforesaid in consequence of coercion on the part of the officers and agents of said Spokane & Eastern Trust Company and not in pursuance of his own free will, said officers and agents of said Spokane & Eastern Trust Company being fully advised of the mentally and physically unfit condition of said defendant on said date.

WHEREFORE defendants pray judgment that plaintiff take nothing by its said amended complaint; that said action be dismissed and that defendants have and recover their costs and disbursements herein expended.

O. C. MOORE,

Attorney for Defendants B. Schade and Sophia Schade, His Wife.

State of Washington,
County of Spokane,—ss.

Sophia Schade, being first duly sworn, on oath deposes and says: That she is one of the answering defendants in the above-entitled action; that she has read the foregoing and attached answer, knows

the contents thereof and that the same is true as she is advised and verily believes.

SOPHIA SCHADE.

Subscribed and sworn to before me this 23d day of November, A. D. 1917.

R. P. WOODWORTH,
Notary Public in and for the State of Washington,
Residing at Spokane.

Service of the within instrument, by the delivery of a true and correct copy thereof, hereby admitted and accepted this 23d day of November, A. D. 1917.

McCARTHY & EDGE,
Attorneys for Plaintiff

Filed Dec. 4, 1917, at 1 o'clock P. M. Glen B. Creighton, Clerk. E. E. Burton, Deputy.

STATE FINANCE COMPANY,
vs. Plaintiff,
B. SCHADE BREWING CO. et al.,
Defendants.

State of Washington,
County of Spokane,—ss.

No. 55,148.

CERTIFICATE.

I, Emery P. Gilbert, Clerk of the Superior Court of the State of Washington, for the County of Spokane, do hereby certify that the above and foregoing is a true and correct copy of the answer in the above-entitled cause, as the same now appears on file and of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 24th day of June, 1920.

[Seal]

EMERY P. GILBERT,
Clerk.
By W. C. Steinmetz,
Deputy.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 18, 1920. W. H. Hare, Clerk.

No. 3693. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 31, 1921. F. D. Monekton, Clerk.

Plaintiff's Exhibit No. 6.

In the Superior Court of the State of Washington in and for the County of Spokane.

No. 55,148.

STATE FINANCE COMPANY, a Corporation,
Plaintiff,

vs.

B. SCHADE BREWING COMPANY, a Corporation,
B. SCHADE and SOPHIA SCHADE,
His Wife,

Defendants.

ANSWER.

Comes now B. Schade Brewing Company, a corporation, one of the defendants and for answer to the amended complaint in the above-entitled action admits, denies and alleges as follows, to wit:

1. Admits paragraph 1 of said amended complaint.

2. Admits paragraph 2 of said amended complaint.

3. Admits the matters and things set forth and alleged in paragraph 3 of said amended complaint.

4. Denies the matters and things set forth and alleged in paragraph 4 of said amended complaint.

5. Admits the matters and things set forth and alleged in paragraph 5 of said amended complaint, except that defendant denies that defendant B. Schade guaranteed said notes, either or any of them, on behalf or for the benefit of the community, consisting of B. Schade and Sophia Schade, his wife, and alleges that said notes were executed and given in payment of other and pre-existing notes aggregating said sum of \$50,000.00.

6. Admits the execution by this defendant of the notes referred to and partially described in paragraph 6 of said amended complaint, but denies that said notes were of like tenor and effect with the notes alleged in paragraph 5 of said amended complaint; denies that said notes are of like tenor and effect with the notes described in said mortgage; denies that same were given in renewal of the notes alleged in paragraph 5 of said amended complaint or in renewal of the notes described in said mortgage, and denies each and every matter and thing set forth in paragraph 6 not herein specifically admitted.

7. Admits the execution by this defendant of the notes referred to and partially described in para-

graph 7 of said amended complaint, but denies that said notes were of like tenor and effect with the notes alleged in paragraph 6 of said amended complaint; denies that said notes are of like tenor and effect with the notes described in said mortgage; denies that same were given in renewal of the notes alleged in paragraph 6 of said amended complaint or in renewal of the notes described in said mortgage, and denies each and every matter and thing set forth in paragraph 7 not herein specifically admitted.

8. Admits the execution by this defendant of the notes referred to and partially described in paragraph 8 of said amended complaint, but denies that said notes were of like tenor and effect with the notes alleged in paragraph 7 of said amended complaint; denies that said notes are of like tenor and effect with the notes described in said mortgage; denies that same were given in renewal of the notes alleged in paragraph 7 of said amended complaint or in renewal of the notes described in said mortgage, and denies each and every matter and thing set forth in paragraph 8 not herein specifically admitted.

9. Admits the execution by this defendant of the notes referred to and partially described in paragraph 9 of said amended complaint, but denies that said notes were of like tenor and effect with the notes alleged in paragraph 8 of said amended complaint; denies that said notes are of like tenor and effect with the notes described in said mortgage; denies that same were given in renewal of the notes

alleged in paragraph 8 of said amended complaint or in renewal of the notes described in said mortgage, and denies each and every matter and thing set forth in paragraph 9 not herein specifically admitted.

10. Denies the matters and things set forth and alleged in paragraph 10 of said amended complaint except that defendant admits that the guaranty clauses on the instrument therein set forth were signed by said defendant B. Schade under the circumstances and conditions hereinafter alleged and not otherwise.

11. Admits the execution and delivery to the Spokane & Eastern Trust Company of the mortgage referred to in paragraph 11 of said amended complaint, a copy of which is attached thereto as Exhibit "A," and denies that said mortgage was given to secure the payment of the notes, or any of the notes, alleged and described in said amended complaint, and denies each and every other matter and thing alleged in said paragraph 11 not herein specifically admitted.

12. Denies the matters and things set forth and alleged in paragraph 12 of said amended complaint.

13. Denies any knowledge or information sufficient to form a belief as to the matters and things set forth and alleged in paragraph 13 of said amended complaint.

14. As to paragraph 14 of said amended complaint, denies that there is due or owing to the plaintiff on account of said notes and mortgage or either or any thereof, the sum of \$50,000 with in-

terest thereon at 8% per annum from July 3, 1916, or any other sum or amount whatever.

15. As to paragraph 15 of said amended complaint, denies any knowledge or information sufficient to form a belief as to whether the plaintiff and its predecessors in interest, or either of them, paid any portion or part of the insurance premiums alleged in said paragraph 15 to have been paid by them.

16. Denies that the sum of \$2,500 or any other sum or amount whatever is a reasonable sum to be allowed to plaintiff as an attorney's fee in this action.

For a further separate and affirmative defense to said amended complaint defendant alleges:

I.

That the promissory notes alleged, referred to and partially described in paragraphs 5, 6, 7, 8 and 9 of said amended complaint were, before the institution of this suit, fully paid, satisfied, cancelled, discharged and surrendered to this defendant.

II.

That the plaintiff herein, State Finance Company, a corporation, did not take and does not now hold the mortgage described in said amended complaint nor the notes thereby secured as a *bona fide* purchaser in due course before maturity for a valuable consideration, but that whatever right, title, claim or interest it has in said mortgage, or any obligation thereby secured, was acquired as the agent of said Spokane & Eastern Trust Company for the purpose of collection only after maturity with full knowl-

edge of all the circumstances concerning the relations between the said Spokane & Eastern Trust Company and this defendant, and with full knowledge of all the circumstances and conditions surrounding the execution of the various instruments alleged and described in the amended complaint herein.

WHEREFORE defendant prays judgment that plaintiff take nothing by its said amended complaint; that said action be dismissed and that defendant have and recover its costs and disbursements herein expended.

O. C. MOORE,

Attorney for Defendant B. Schade Brewing Company, a Corporation.

State of Washington,
County of Spokane,—ss.

Sophia Schade, being first duly sworn on oath deposes and says: That she is an officer, to wit, a trustee, of the B. Schade Brewing Company, a corporation, one of the defendants in the above-entitled action and makes this affidavit for and on behalf of said defendant in her said capacity as a trustee thereof; that she has read the foregoing and attached answer, knows the contents thereof and that the same is true as she is advised and verily believes.

SOPHIA SCHADE.

Subscribed and sworn to before me this 23d day of November, A. D. 1917.

R. P. WOODWORTH,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 18, 1920. W. H. Hare, Clerk.

No. 3693. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 31, 1921. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 7.

LIST AND DESCRIPTION OF MACHINERY.

B. SCHADE BREWING CO.

ENGINE-ROOM 1ST FLOOR.

One Frick 12 ton Ice making, or 25 ton Refrigerating machine, complete with ammonia tank, etc.; with necessary condenser piping in storage room on 3rd floor, consisting of about 960 ft. 2" pipe, suction header and tools. Shipping weight approximately 25000 lbs.

Necessary piping from this machine to adjacent boiler room, with steam trap, oil trap and various steam services throughout the building, with necessary valves, etc., such as are customary in steam installation of first-class character. S. W. App. 5000 lbs.

1 platform freight elevator, 4000 lbs, capacity, motor driven. 40 ft. lift, with a 10 H. P. motor, Fairbanks-Morse 900 R. P. M. 500 volts. S. W. App.	7000 lbs.
1 20 H. P. Nagle Steam Engine No. 16,416. S. W. App.....	1000 lbs.
1 5 $\frac{1}{4}$ x3 $\frac{1}{2}$ x5 Gardner Air Pump, single cylinder. S. W. App.....	250 lbs.
1 6x7x6 Double Cylinder Canton Pump Co. Air Pump, with 10"x60" air tank. S. W. App.....	1200 lbs.
1 Steel Hop Jack, 10 ft. diam. 6' 6" high, with copper false bottom. S. W. App.....	4000 lbs.
1 5 $\frac{1}{2}$ x3 $\frac{1}{2}$ x5 Gardner Duplex Steam Pump, used as beer pump from hop jack to beer cooler above with connections.....	400 lbs.
1 Chas. Kiewert Chip Washer, 32" diam. 60" long.....	750 lbs.
1 Loco Magic Steel Filter Washer 43" diam. 96" long. Loew Mfg. Co.....	4000 lbs.
1 Motor and Shafting to drive the two preceding machines with shifting pulleys, belting, etc., so that either can be driven separately, cast iron shaft hangers, steel pulleys, Motorpa 3 H. P. Westinghouse Induction Motor, 200 volts, 1120 R. P. M. S. W. App.	750 lbs.

Steam, water and air-piping connections, valves, etc.; connecting boilers to pumps, pumps to chip casks, brew kettle, engine, etc., with 5" steam header with 3 valve controlled openings. Piping from $3\frac{3}{4}$ " to 4".

- 1 American Feed Water Heater, No. 11 Shop No. 4820.

BREW-ROOM.

- 1 Goetz & Flodin Copper Kettle, steam heated, set on 4 cast iron columns, 13 ft. long, 5" diam. with steam connections, and steam trap, copper goose neck 24" diam. and steel vent pipe to roof, copper pipe to hop jack. 110 barrels capacity.

- 1 Steel Mash Tub (Goetz & Flodin) 12 ft. diam. 6 ft. high, with vermasher and copper grande, with three outlets; steel beam supports consisting of 8-6" steel beams 14 ft long, 1-12" beam 13 ft. long and cast iron post supports. Cast iron mixing apparatus, same connected to main drive shaft with 8" leather belt about 30 ft. long, and friction clutch.

2 $\frac{1}{4}$ " main counter shaft, 16 ft. long on 4 cast iron hangers, with 11x36" steel driving pulley connecting with engine below, also drive to counter-shaft above and to *conter* shaft for wash-room, belting and connections. Steel pulleys of proper sizes, belt tightener, frame, etc.

- 1 Platform freight elevator, belt driven, capacity 1500 lbs., platform 5'x6'x6", with standard gear and control devices.

MALT MILLING-ROOM.

- 1 Olsen & Tilgner steel bucket elevator, 8"x10" steel

spouts to elevator, 20 ft. long. Steel boot and head gear, belted to main counter-shaft.

- 1 Olsen & Tilgner Malt Mill and malt screen, complete with enclosing box and belt driven drive gear, 6" leather belt 30 ft. long.
- 1 Steel Rice Cooker, 7 ft. diam. 7 ft. high, belt driven, with driving gear complete, 6" belt 30 ft. long.
- 1 Steel hot-water tank, 10 ft. diam. 8 ft. high, with steam exhaust coils for heating same.
- 1 7x4 $\frac{1}{2}$ "x6 Gardner Duplex Pump.
- 1 Main counter-shaft 2", 26 ft. long, 7 C. I. hangers, 4 cast iron pulleys, one friction clutch for rice cooker, 8" main drive belt to main shaft 1 story below and connected to rice cooker, elevator and malt mill, etc.

LOFT ROOM.

- 1 Baudlet beer cooler, 28 copper tubes 2 $\frac{1}{4}$ " diam., 16 ft. long, with steel tray, 12"x36"x18 ft. long.

SMALL WASH-ROOM.

- 1 Rauch pitching machine and pitch tank.
- 2" steel shaft in two wash-rooms, 64 lin. ft. 8 C. I. shaft-hangers.
- 6 split wood pulleys.

LARGE WASH-ROOM.

- 1 Olsen & Tilgner machine for washing outside of kegs.
- 1 John S. Cram Hoop Driver machine No. 411,832.
- 1 5 H. P. induction motor, Gen. Electric Co. 60 cycle, 220 volts for driving keg washer and hoop driver with necessary counter shaft and belting.

- 1 3 keg stand sprinkler for washing inside of kegs, for hot and cold water, with necessary connecting pipe, etc.

RACKING-ROOM.

- 1 New White 3 keg racking machine complete.

CHIP CELLAR.

- 1 Keifer Filter 24 inch diam.

- 1 24" Keifer Filter press.

SUNDRIES.

Sundry supplies, such as rubber hose, tools, utensils, etc., of various kinds.

Number of available kegs is largely approximate, about 20000 $\frac{1}{4}$ bbls., $\frac{1}{2}$ bbls. and barrels, which when re-coopered will be as serviceable as new kegs.

REFRIGERATING PIPING: 9000 lin. ft. 2" EXTRA HEAVY piping and connections and return bends etc.

COOPERAGE.

- 2 fir water-tanks, 14 ft. diam., 10 ft. ~~high~~ stave, $2\frac{1}{4}$ " thick, 9-4" hoops, capacity 315 barrels.

Chip Casks: 14 oak casks, 12 ft. diam., 11 ft. long, $3\frac{1}{2}$ oak staves, 14 steel hoops, Heiser Patent Doors, capacity each 300 bbls.

- 8 oak casks, 12 ft. ~~stave~~ diam., 8 ft. stave, $2\frac{3}{4}$ " stave, 12 hoops, Heiser patent doors. Cap. each 180 bbls.

- 12 oak casks, 7 ft. stave, 8 ft. diam., $2\frac{1}{4}$ " stave, 10 steel hoops. cap. each 45 bbls.

Stock Tanks: 13 fir tanks, 8 ft. diam. 12 ft. high, 2" staves, 12 hoops, Heiser patent doors, cap. each 100 bbls.

FERMENTING TUBS.

5 Tubs, 7' 6" diam.; 7 ft. staves, 1-5/8" thick, 7 hoops with brine circulating coils in same, cap. each 55 bbls.

10 fir fermenting tubs, 8 ft. diam. 8 ft. staves, staves 2" thick, 6 hoops cap. each 75 bbls.

BOILER-ROOM.

1 Babcock & Wilcox 250 H. P. water-tube boiler, 150 lbs. working pressure, with 60 ft. steel stack.

1 Duplex Worthinton pump steam, 7 1/2 x 5 x 6.

Water piping with proper valves, expansion joints, feed pipes to pump, etc.

BOTTLE-SHOP.

1 New Eick No. 32354 Bottle Washer, Goetz Mfg. Co.

1 Jos. Posh Air Pump double cylinder.

1 Henes & Keller Co., Bottle filler, 10 bottle capacity.

1 Crown Cork & Seal Co. Corking machine.

4 barrel tap devise for transferring from kegs to bottle filler to take beer from 4 kegs.

1 Motor driven pasteurizer, Mfg. by Barry Weh-miller Mach. Co., St. Louis, Mo. 6' x 11' pasteurizing tank.

1 Economic Machinery Co. "World Labler."

1 Crown Corker for soft drinks.

1 Motor driven carbonizing & filling machine for sodas, Mfg. by Liquid Carbonic Co., Chicago.

1 Loew Beer Filter. Piping and sundries.

Shafting and belting equipment, 9 cast iron hangers, 75 lin. ft. shafting, 3 wood split pulleys, small

cast iron pulleys, with power induction motors and belting to the various machines.

5 H. P. 1800 Rev. 200 volt, Gen. Elect. Co. Motor.

This list subject to change or revision without notice in accordance with sales.

K. J. S.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 18, 1920. W. H. Hare, Clerk.

No. 3693. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 31, 1921. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 9.

SPOKANE AND EASTERN TRUST CO.

Spokane, Washington.

August 25, 1919.

The Stockholders of the B. Schade Brewing Company:

As you know, the Spokane and Eastern Trust Company was a creditor of the B. Schade Brewing Company under a note for \$60,000 secured by a mortgage on the real estate, plant and equipment of the corporation. The mortgage being in default, with no prospect of payment, we negotiated with the officers of the company to effect some settlement, and we finally were compelled to institute a suit for foreclosure. The suit was subsequently dismissed when the Brewing Company and the Spokane and Eastern Trust Company came to an agreement whereby the property covered by the mortgage was deeded to the trust company and the indebted-

ness of the brewery to the bank was cancelled. Simultaneously the brewing company was granted an option for practically eighteen months expiring July 1, 1919, to purchase the property thus conveyed on payment to the Spokane and Eastern Trust Company of the amount of the brewery's indebtedness, together with accrued interest at seven per cent, plus any taxes and expenses that the trust company might have advanced in the care of the property in the meantime. The period covered under this option having expired, the rights of the B. Schade Brewery Company to repurchase the property have terminated. The Spokane and Eastern Trust Company is accordingly owner of the brewery and equipment.

It is believed that there is a substantial equity in the value of the property in excess of the amount of the investment of the Spokane and Eastern Trust Company, and in an earnest desire that the stockholders shall get the benefit of whatever equity there may be in the property, we have consulted with some of the larger stockholders and their counsel, and the Spokane and Eastern Trust Company submits the following proposition:

As of September 1, 1919, the amount invested by the Spokane and Eastern Trust Company on its claim, together with accrued interest, taxes, expenses and carrying charges, is approximately \$76,000. The capital stock of the B. Schade Brewing Company is 7,500 shares.

The stockholders of the B. Schade Brewing Company who desire to protect their equity in the brew-

ery will have accordingly a *pro rata* liability of roundly \$10 per share if they were to contribute equally to take up the investment of the Spokane and Eastern Trust Company. To all such stockholders who desire to pay on account of this indebtedness a sum equal to \$10 per share on the stock held by them, we are prepared to give them a proportionate interest in the property on the ratio that payments made by them bear to the total investment of the bank. For example, if the holder of one hundred shares of Schade stock were to pay \$10 a share or \$1,000 as of September 1, 1919, and if the investment of the Spokane and Eastern Trust Company including interest and carrying charges at that time were \$76,000, such stockholder would have an undivided one seventy-sixth interest.

If all of the stockholders of the B. Schade Brewing Company would make a contribution under this arrangement, the Spokane and Eastern Trust Company would be paid in full, and the stockholders would collectively own the property independent of their status as shareholders in the brewing company.

As, however, it is very doubtful whether all the stockholders will be able to take advantage of this offer, we are uncertain what percentage of ownership would be retained by the Spokane and Eastern Trust Company. If only a few thousand dollars were paid in, the bank would be in the position of holding a fractional interest in the property in common with such shareholders as might participate. As any individual shareholders who had become a possessor of an undivided interest in the property

could then stop any sale or lease of the property, the situation that would thus result might be exceedingly disastrous to all concerned. The uniform consent of all the owners would be required before any disposition could be made of the property, and, on the death of any individual shareholder, it would be necessary to probate his estate in this country to dispose of his interest in this property. To obviate these difficulties, the exclusive management, sale, leasing or disposition of the estate shall be vested in the Spokane and Eastern Trust Company with power to act at any time in accordance with its best judgment. Any income that may be derived from the rental of the property after paying the operating expenses, would be held for the joint account of all the participants, and in the event of a sale (which could be effected at any time in the exclusive discretion of the Spokane and Eastern Trust Company as trustee for the participating stockholders) the proceeds of the sale would be distributed *pro rata* among such participants and the trust company.

We, of course, cannot guarantee any results from the operation of the property under this change. We can, however, guarantee that all the stockholders who join with us in this plan will share equally with ourselves in the liquidation of the property.

Stockholders who desire to take advantage of this proposition should communicate with us at once, and should make payment not later than October 1, 1919. All rights of participation will terminate automatically on that date. Interest from September 1 on the amounts paid by them at the rate of

seven per cent per annum should be added to their remittance up to the date remittance reaches us.

Legal matters in connection with the transaction will be handled by Graves, Kizer & Graves of Spokane. The interest of the shareholders who participate will not be in the real estate, but solely in the net income and in the net proceeds of the sale thereof, and will be represented not by a deed but by a declaration of trust given by the Spokane and Eastern Trust Company in a form approved by Messrs. Graves, Kizer & Graves.

Attached herewith is a statement of the account with the Spokane and Eastern Trust Company calculated as of September 1, 1919. The account may vary slightly when finally closed on that date, but the difference will not be material.

Yours truly,

W. B. HUBBARD,

W. B. HUBBARD,

Assistant to President.

B. SCHADE BREWING COMPANY

to

September 1, 1919.

	Orig.	Adv. 7%	Interest to 9-1-19.
1- 1-18	62 601 80		7 303 54
3-13-18	Personal property tax.....	135 28	13 86
4- 2-18	Abstract and recording.....	9 50	93
4-11-18	Insurance	60 50	5 87
5-22-18	First half real estate tax....	1 035 12	
	Insurance	106 55	101 93
6-14-18	Attorneys fees	1 000 00	84 97
10-30-18	Roof repairs	89 00	5 21

11- 4-18	Insurance	93 75	5 43
12- 4-18	Insurance	143 75	7 48
12-11-18	Second half tax and interest.1	102 36	55 67
1-29-19	Judgment paid	243 12	10 01
3- 5-19	Insurance	63 87	2 19
4-18-19	Insurance	49 50	1 29
5- 2-19	Insurance	67 70	1 58
5-26-19	First half 1918 tax.....1	039 05	19 19
7-25-19	1918 personal tax and interest	158 48	1 11
8-17-19	Second half 1918 tax.....1	039 05	2 82
		<hr/>	
		69 038 38	7 623 08

Credits.

4-19-18	Return a/c overpayment of tax.	2 07	19
10- 5-18	Sale of machinery.....	603 75	38 28
		<hr/>	
		605 82	38 47
Net.....		68 432 56	7 584 61
		<hr/>	
		7 584 61	
		<hr/>	
		76 017 17	

[Endorsed]: Filed in the U. S. District Court,
Eastern District of Washington. Oct. 18, 1920.
W. H. Hare, Clerk.

No. 3693. United States Circuit Court of Ap-
peals for the Ninth Circuit. Filed May 31, 1921.
F. D. Monckton, Clerk.

Defendants' Exhibit No. 10.

Spokane, Wash., Sept. 24, 1917.

Sep. 26, 1917.

Spokane Eastern Trust Co.,
City.

This is to inform you of conditions as they exist
at the present time with the B. Shade Brewing
Company, of which you are a stockholder.

In the past two months things have developed rapidly, due I suppose to the war and the fact that money is a scarce article in circulation.

Business matters with this corporation are going to change for the worse or the better, owing to the fact that the Spokane & Eastern Trust Co. is pressing with the mortgage of Fifty Thousand (\$50,000) Dollars and interest, which they hold against this firm. I have always been solicitous for the welfare of the stockholders, and now I would ask for your opinion in this matter.

In order to safeguard your own interests quick action must be taken in the matter of paying this debt to the bank, otherwise if I am forced to sell for the mortgage when the appraised valuation of this property and buildings is at least ten times the sum of the mortgage, a grave injustice will have been committed, together with a great loss to all concerned.

I trust you will understand this situation.

Perhaps it would be for the best interests of all concerned to sell outright. This is the plan that I look most favorable to at present.

Awaiting your reply, I remain,

Very truly yours,

THE B. SCHADE BREWING CO.

B. SCHADE,

President.

[Endorsed]: Filed in the U. S. District Court,
Eastern District of Washington. Oct. 18, 1920.
W. H. Hare, Clerk.

No. 3693. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 31, 1921. F. D. Monckton, Clerk.

Defendants' Exhibit No. 11.

Cable Address "Schade."

Western Union Code.

Telephone Connections.

P. O. Box 1685.

THE B. SCHADE BREWING CO.,

Sheridan and Front Sts.

Spokane, Wash. May 31, 1918.

Jun. 14, 1917.

Spokane Eastern Trust,
City.

Dear Sir:

You have doubtless received a copy of the letter of May 25th, of R. L. Rutter, president of the Spokane & Eastern Trust Co., together with a copy of the form letter, concerning the affairs of the B. Schade Brewing Co., though the undersigned, the largest individual stockholder, was not favored with a copy.

The obvious purpose of this communication is to create the impression that the officers of the Brewing Company are not acting for the best interests of the stockholders in the conduct of the affairs of the Brewing Company. As stated in Mr. Rutter's letter, under pressure of legal proceedings, the company was forced to deed over its entire holdings to the Spokane & Eastern Trust Co. with the right of redemption at any time on or before July 1st, 1919.

The bank having thus exacted and obtained its pound of flesh in consequence of the temporary inability of the company to promptly continue payment of the high interest rate which had been extracted for several years previous owing to conditions, not now necessary to relate, now seeks to assume a solicitous attitude concerning the affairs of the Brewing Company and the handling of this equity of redemption, the only remaining asset of the company.

While the writer, who has devoted the best years of his life to the affairs of the B. Schade Brewing Company in an endeavor to make it a successful and profitable institution and with a large degree of success prior to the prohibition laws, is more than glad to have the stockholders fully advised as to the conditions, the position now assumed by the Spokane & Eastern Trust Co. does not bear the stamp of sincerity.

For several months past the officers of the Brewing Company have been exerting themselves to find a purchaser of the property. More than one year, however, remains for redemption under the agreement with the bank, and it has not, therefore, been thought necessary to act with undue haste, particularly in view of the depressed real estate market in consequence of war conditions.

While as above stated, it is difficult to understand the motive of the Spokane & Eastern Trust Co. in writing this letter concerning the properties to which it now holds a record title, obtained by the most drastic methods, the writer has it on good authority that an officer of the bank has intermed-

dled in at least one of the prospective deals for the sale of this property being conducted by the officers of the Brewing Company and its agents.

Our purpose in writing this letter is to advise of the sincere desire and purpose of the managing directors of the B. Schade Brewing Company to get the very best possible results for all concerned from the small remaining fragments of the once exceedingly valuable holdings of that concern. In our effort to obtain these results, fair and conscientious counsel and advice of any and all stockholders is solicited and will at all times be highly appreciated.

Very truly yours,

B. SHADE BREWING COMPANY,

B. SCHADE,

President.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 18, 1920. W. H. Hare, Clerk.

No. 3693. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 31, 1921. F. D. Monckton, Clerk.

Defendants' Exhibit No. 12.

In the Superior Court of the State of Washington,
in and for the County of Spokane.

#55,148.

STATE FINANCE COMPANY, a Corporation,
Plaintiff,

vs.

B. SCHADE BREWING COMPANY, a Corpora-
tion, B. SCHADE and SOPHIA SCHADE,
His Wife,

Defendants.

ORDER.

This matter came on for hearing on application
for dismissal of said cause:

It appearing by stipulation on file that said cause
has been fully settled;

IT IS ORDERED that said cause be and the
same is hereby dismissed *with* prejudice and with-
out cost to either party.

Done in open court this 9th day of March, 1918.

HUGO EDSWALD,
Judge.

STATE FINANCE COMPANY, a Corporation,
Plaintiff,

vs.

B. SCHADE BREWING COMPANY, a Corpora-
tion, B. SCHADE and SOPHIA SCHADE,
His Wife,

Defendants.

State of Washington,
County of Spokane,—ss.

No. 55,148.

CERTIFICATE.

I, Emery P. Gilbert, Clerk of the Superior Court of the State of Washington, for the County of Spokane, do hereby certify that the above and foregoing is a true and correct copy of the Order of Dismissal in the above-entitled cause, as the same now appears on file and of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, this 19th day of October, 1920.

[Seal]

EMERY P. GILBERT,

Clerk.

Harry C. Clark,

Deputy.

[Endorsed]: Filed in the U. S. District Court, Eastern District of Washington. Oct. 18, 1920.
W. H. Hare, Clerk.

No. 3693. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 31, 1921.
F. D. Monckton, Clerk.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

No. 3693.

ERNA KORN and MUTUAL SECURITIES COMPANY,

Appellants,

vs.

SPOKANE & EASTERN TRUST COMPANY, THE B. SCHADE BREWING COMPANY, B. SCHADE and L. R. STRITESKY,

Appellees.

IN EQUITY.
Appeal from
the District
Court, Eastern
District of Washington,
Northern Division.

Appellant's Brief

CALEB JONES and
POST, RUSSELL & HIGGINS,
Solicitors for Appellants.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

No. 3693.

ERNA KORN and MUTUAL SECURITIES COMPANY,

Appellants,

vs.

SPOKANE & EASTERN TRUST COMPANY, THE B. SCHADE BREWING COMPANY, B. SCHADE and L. R. STRITESKY,

Appellees.

IN EQUITY.
Appeal from
the District
Court, Eastern
District
of Washington,
Northern
Division.

Appellant's Brief

STATEMENT.

This suit was instituted by Erna Korn, a resident and citizen of the State of New York, against the Spokane & Eastern Trust Company and The B. Schade Brewing Company, corporations, organized

and existing under and by virtue of the laws of the State of Washington, and having their principal place of business at Spokane in said state, being citizens and inhabitants of the Eastern District thereof, and against B. Schade and L. R. Stritesky, citizens and residents of the State of Washington and the Eastern District thereof. The bill of complaint was filed by Erna Korn, a stockholder of the Brewing Company, in her own behalf and on behalf of other stockholders who might join and contribute to the expense. After due service, but one of the defendants appeared and answered. Subsequently to the joinder of issue by the plaintiff, Erna Korn, and the defendant, Spokane & Eastern Trust Company, and before the trial thereof, the Mutual Securities Company, a corporation organized and existing under and by virtue of the laws of the State of Minnesota, petitioned and was permitted to intervene in said cause as a party plaintiff, the relief sought being identical with that prayed for by the plaintiff. In due time a trial of the cause was had and a final decree of dismissal was entered dismissing plaintiff's and intervenor's complaint, from which decree an appeal has been taken by them to this Court. For the sake of brevity, hereinafter, the defendant, The B. Schade Brewing Company, will be spoken of as the Brewing Company, the defendant, the Spokane & Eastern Trust Company, as the bank, and the Mutual Securities Company, as intervenor, and the plaintiff and other defendants by their proper designations. It is admitted as is al-

leged in the complaint, that plaintiff is now and has been since the 23rd day of August, 1907, the owner of 50 shares of the capital stock of the Brewing Company (See Trans., p. 25); and that the Intervenor is the owner and holder of 200 shares of its capital stock; that the Brewing Company was organized in 1903, its existence to continue for a period of fifty years, and its objects were as follows, to-wit:

“To brew, manufacture and sell beer and to carry on and conduct a general brewing and malting business, and to purchase all materials that may be necessary for the purpose of carrying on and conducting a general brewing and malting business; also to acquire, purchase and sell real as well as personal property of every nature and kind, for the purpose of carrying on and conducting a general brewing and malting and bottling business; also to build and erect breweries, malt houses and bottling works in any part of the State of Washington, Idaho, Oregon, California and Montana, and to purchase all things necessary and proper for the purpose of carrying out of the objects of this corporation or any part of them.” (See Trans., p. 4 and 24.)

It is further admitted that at the time of the organization of said Brewing Company, its capital stock was \$150,000, which was increased in June, 1905, to \$250,000, and again in April, 1907, to \$750,000. That the present capital stock of said company is divided into 7500 shares of the par value of \$100 each; that there is now outstanding 5000 shares of said capital stock; that said corporation

has a board of three trustees, and since April, 1917, Sophia Schade, the defendants, B. Schade and L. R. Stritesky, have constituted such board. It is further admitted that the defendant, B. Schade, now and has been the president, and L. R. Stritesky its secretary, since the date of its organization. (See Trans., p. 24) It is further admitted that in pursuance of the objects of its organization, said Brewing Company purchased the real property described in plaintiff's complaint and during all of the times mentioned used the same in the active prosecution of the objects of its organization. The said property constitutes practically all the holdings of the said Brewing Company. That on or about the 24th day of January, 1918, the defendant, B. Schade, was the president, and the defendant, L. R. Stritesky, was the secretary, and they, together with Sophie Schade, wife of said B. Schade, constituted the board of trustees of said Brewing Company. That the said B. Schade as president, and the said L. R. Stritesky as secretary, conveyed all of the said property of the Brewing Company to the said bank by that certain warranty deed which has been duly recorded in Book 355 of Deeds at page 599 of the Records of Spokane County, State of Washington. That the property in said deed described is set forth in plaintiff's complaint (See Trans., p. 7-9). It is further admitted that contemporaneous with the execution and delivery of said warranty deed, the defendant bank, as party of the first part, entered into a certain agreement with the defendant Brew-

ing Company and the defendant, B. Schade, a copy of which is attached to plaintiff's complaint and made a part hereof, marked Plaintiff's Exhibit "A". That the plaintiff was a shareholder at the time of the execution of said warranty deed and agreement, and this suit is not a collusive one to confer on the court jurisdiction of which it would not otherwise have cognizance.

The plaintiff and intervenor makes the further allegation, which is denied by the defendant bank, that the Brewing Company in pursuance of the objects of its organization, purchased the real property described in said deed and agreement for a consideration of approximately \$100,000, and thereafter expended in building on said property approximately the sum of \$250,000, and for the installation of machinery and equipment therein an additional sum of approximately \$100,000, and that said property is at the present time reasonably worth the sum of \$350,000, and was all essential and necessary for carrying into effect and execution the objects of said corporate organization, and without it the active life of said corporation is suspended. The plaintiff makes the further allegation, which is denied by the defendant bank, that the said Schades owned and had control of a majority of the shares of the capital stock of the Brewing Company, and exercised arbitrary control over the affairs and management of said company, and still are such officers and still continue to exercise such ownership and control with absolute disregard of the rights of the minority

stockholders thereof. It is further alleged that while acting as such officers, said defendants, B. Schade and L. R. Stritesky, purporting to act in behalf of the said corporation, and in violation of the rights of the plaintiff and all other minority stockholders, and without previous authorization of either the Board of Trustees or the stockholders of said company, and in transgression of its charter provisions, and with the intent and for the purpose of making and securing certain personal advantages over the other stockholders, conveyed all of the said property of the Brewing Company to the bank on the 24th day of January, 1918, and that contemporaneous with the execution and delivery of said deed, entered into that certain agreement, marked Plaintiff's Exhibit "A", which was intended to and did secure to the defendant, B. Schade and Sophia Schade, his wife, the right to the individual use of said property for a year and six months without rental, and they were released from all personal liability by reason of their having signed certain notes sued upon by the State Finance Company. That said concessions were made to the said B. Schade and wife as an inducement or consideration for his execution of that certain deed or conveyance. It is further alleged and testified to by the plaintiff and not controverted by any testimony on the part of the defendant bank, "that during all of the times herein mentioned, the plaintiff has resided at New York City, New York, and had no notice or intimation of whatever kind of the execution of the foregoing

mentioned conveyance or agreement, and never consented or assented to any such acts or become cognizant of their performance until on or about the first day of June, 1919, when the plaintiff was informed of the same by the said B. Schade. That thereafter the plaintiff employed counsel, and as she is informed and believes and therefore avers, that on or about July 15, 1919, said counsel on her behalf made demand upon said Brewing Company and its said managing officers and trustees, to bring or cause to be brought an action against the defendant bank to set aside as illegal and void said warranty deed and agreement, and said Brewing Company and its officers refused to bring any such action or to take any steps for an avoidance of said deed and agreement. That said B. Schade and Sophia Schade, his wife, are still in possession and charge of said property."

It is further alleged by plaintiffs, and denied by defendant bank, "that the acts complained of are fully executed and completed, and the plaintiff is informed and believes and therefore avers, beyond the power of the Brewing Company or its managing officers to have said deed and agreement set aside without resort to a court of equity; that the plaintiff is remediless at law and the exercise of the equitable powers of this court are necessary to redress plaintiff's wrong and injuries aforesaid in the conveying of all of the property of the Brewing Company and the suspension of its corporate life

contrary to the statute in such cases made and provided, and in violation of the rights and privileges of the plaintiff.”

In addition to the foregoing denials, the defendant bank has set forth three affirmative defenses:

First. That the property in question was conveyed to the defendant in payment and satisfaction of an indebtedness of the Brewing Company, and that no part thereof has been paid.

Second. That plaintiff has been guilty of laches.

Third. That in paragraph I (See Trans., p. 28) it is stated in substance that prior to October 1, 1914, the Brewing Company borrowed of the bank \$50,000, which was used in its business, and on October 5, 1914, executed a mortgage on all its property to secure the payment of the same.

In paragraph 2 (See Trans., p. 29) it is stated that “prohibition of the manufacture and sale of intoxicating liquors within the state of Washington destroyed the business of the Brewing Company and rendered it incapable of paying its debts or of paying the taxes on its property.” It is further alleged in substance that the mortgage was assigned to the State Finance Company, a subsidiary corporation of the bank, which made some disbursements on account of delinquent taxes and insurance and then brought suit to foreclose, and that pending that suit, at the solicitation and request of the Brewing Company, an agreement, Plaintiff’s Exhibit “A”, was

entered into. In paragraph 3 (See Trans., p. 30), it is alleged that the Brewing Company was without defense to the foreclosure suit and the sole purpose of the arrangement was to relieve it of the costs of foreclosure suit and sale and probable deficiency judgment. The answer further alleges in substance that by virtue of said agreement the shareholders of the Brewing Company obtained, in effect, a period of redemption of eighteen months instead of one year, and made no offer to repurchase the property under the terms of said agreement. Lastly, it is alleged that the defendant bank offered to the stockholders of the Brewing Company an opportunity to become proportionate owners of the property conveyed by paying the defendant in proportion to the number of shares held. Plaintiff and intervenor deny that such offer was brought to their attention.

Plaintiffs allege that "the Schades owned and had control of a majority of the shares of the capital stock of the Brewing Company and exercised arbitrary control over the affairs and management of said company, and still are such officers and still continue to exercise such ownership and control, with absolute disregard of the rights of the minority stockholders thereof." The uncontroverted testimony of the defendant Stritesky is as follows:

"Mr. B. Schade owned 2606 shares of a total of 5000 issued in the B. Schade Brewing Company (See Trans., p. 54). * * * For a number of years before the transaction ended, the

stockholders' meeting consisted of the Schades and myself, and the Schades and myself were at all times the board of directors, and the stockholders' meeting and the Board of Trustees' meeting have all been held at the same place.

Q. And you three people ran it?

A. We have—some of us ran it in a way.

Q. As a matter of fact, Schade ran it?

A. Yes, sir.

Q. Just as he pleased?

A. Pretty much so.

Q. From the date of the organization down to the time the thing went up in smoke?

A. I think that is very nearly correct.

Q. Well, it is practically absolutely correct, isn't it?

A. I think you are right there." (See Trans., p. 63.)

The record in this cause does not present any seriously controverted questions of fact except as to the value of the property in question. The value of the property, while not controlling, is material from the viewpoint of appellant and of itself presents a vivid illustration of the necessity of the enforcement of the law as contended for by appellant to avoid fraud and injustice of the most aggravated type. Plaintiff alleged that the value of the property was \$350,000, while the highest estimate placed upon it by the several witnesses testifying on behalf of plaintiff was \$357,000. The minimum valuation placed upon it by Mr. Colburn, a real estate dealer, and the only witness of the defendant testifying as to the value of the property in its entirety, was \$100,000. His lack of qualification to testify

to the value of the building, machinery and brewery equipment leaves his testimony on this question very unsatisfactory, as against the positive testimony of those qualified. Mr. Merryweather, a stockholder and director of the bank, hit the low water mark when he valued the real estate separate from the building, in January, 1918, at \$20,000. (See Trans., p. 85.) The lowest valuation placed upon the building at that particular date was by the defendant, L. R. Stritesky, an experienced architect and builder, and was \$184,057 (See Trans., p. 69), which would make the property, aside from the machinery and equipment, worth \$204,057. To this should be added the uncontroverted testimony of Mr. Lang (See Trans., p. 74), that the machinery and equipment was worth from \$30,000 to \$35,000, and the value of the ice machine sold under stipulation on April 23, 1920 (See Trans., p. 122), for \$12,000, making a total valuation of \$351,057. That the property was much more valuable than the price paid by the defendant bank can hardly be controverted, for in its letter to the stockholders of the Brewing Company it is frankly stated, "It is believed that there is a substantial equity in the value of the property in excess of the amount of the investment of the Spokane & Eastern Trust Company." (See Trans., p. 166). If the trial court is correct in holding in this cause that the President and Secretary of the Brewing Company had absolute power of disposition of all of the property of the company, that they could convey to whom they

pleased, when they pleased, and without any restriction whatever, and for such consideration as they saw fit, payable to the corporation or to themselves personally, then the question as to whether the property was worth \$50,000 or \$650,000 would be immaterial; otherwise it is apparently very material as showing one of the dominating elements of fiduciary relationship—the good faith of the trustees of the corporation and its stockholders—if on no other ground.

ASSIGNMENTS OF ERROR.

(1) The Court erred in dismissing plaintiff and intervenor's complaints on the ground that the trustees of The B. Schade Brewing Company had power to enter into the agreement (Plaintiff's Exhibit "A") and execute the conveyance mentioned in paragraph 7 of plaintiff's complaint, for the reason that there is no controversy over the facts; that said contract is *prima facie* invalid, showing a violation of the fiduciary relation which exists between the trustees and the company and the trustees and individual stockholders in this: that the officers executing the same received certain rights and concessions in said agreement mentioned as an inducement for its execution not enjoyed by the minority stockholders of said corporation; that the execution of the contract and the conveyance of all of the corporate properties thereunder was contrary to the Charter of The B. Schade Brewing Company, in violation of the statutes of the State of Washington, and an

infringement upon the rights of the minority non-consenting stockholders.

(2) The court erred in dismissing plaintiff's and intervenor's complaints on the ground that the trustees of The B. Schade Brewing Company could dispose of all its corporate property without the unanimous consent of all the stockholders, for the reason that it is contrary to its Charter, in violation of the statutes of the State of Washintgon and of the individual rights of the minority non-consenting stockholders.

(3) The court erred in dismissing plaintiff's and intervenor's complaints on the ground that the president and secretary of The B. Schade Brewing Company could dispose of all of the property of said corporation without the previous authorization of the board of trustees and all of the stockholders, for the reason that it is contrary to its Charter, in violation of the statutes of the State of Washington and of the individual rights of the minority non-consenting stockholders.

(4) The court erred in dismissing plaintiff's and intervenor's complaints on the ground that the life of The B. Schade Brewing Company was not suspended by the conveyance of all of its property to the defendant Spokane & Eastern Trust Company, for the reason that said conveyance was contrary to the Charter of The B. Schade Brewing Company, in violation of the Statutes of the State of Wash-

ington and of the individual rights of the minority non-consenting stockholders.

(5) The court erred in dismissing plaintiff's and intervenor's complaints on the ground that the amendment of the State Constitution prohibiting the manufacture and sale of intoxicating liquors authorized the sale and conveyance of The B. Schade Brewing Company to the defendant Spokane & Eastern Trust Company in the manner and form alleged by plaintiff, for the reason that it is contrary to the Charter of The B. Schade Brewing Company, in violation of the statutes of the State of Washington and of the individual rights of the minority non-consenting stockholders.

(6) The court erred in dismissing plaintiff's and intervenor's complaint on the ground that the inability of the defendant, The B. Schade Brewing Company, to pay its debt to the Spokane & Eastern Trust Company authorized and empowered the president and secretary of the Brewing Company to convey all its property to the creditor company in the manner and form alleged, for the reason that it is contrary to the Charter of The B. Schade Brewing Company, in violation of the statutes of the State of Washington and of the individual rights of the minority non-consenting stockholders.

(7) The court erred in dismissing plaintiff's and intervenor's complaint on the ground that no fraud was committed or contemplated in the exe-

cution and procurement of the deed and contract between the defendants, The B. Schade Brewing Company and the Spokane & Eastern Trust Company, for the reason that the contract itself shows that the officers of The B. Schade Brewing Company were acting for their own interests in a manner destructive of the corporation itself and in violation of the rights of the minority non-consenting stockholders.

(8) The court erred in dismissing plaintiff's and intervenor's complaint on the ground that the mortgage from The B. Schade Brewing Company had been satisfied of record, for the reason that it is not material to the issues presented by plaintiff and intervenor and does not excuse or make right the wrong complained of.

(9) The court erred in dismissing plaintiff's and intervenor's complaint on the ground that the mortgagee had been placed in possession by the mortgagor and the mortgage debt had not been paid, for the reason that it does not afford a justification for the continued possession of the property wrongfully procured or for a violation of the rights of the minority non-consenting stockholders of The B. Schade Brewing Company.

(10) The court erred in dismissing plaintiff's

and intervenor's complaints on the ground that the utmost relief that could properly be granted to either The B. Schade Brewing Company or its stockholders would be the right of redemption, for the reason that the contract and conveyance to the Spokane & Eastern Trust Company was beyond the power and authority of the officers executing the same on behalf of The B. Schade Brewing Company, was invalid, in violation of the statutes of the State of Washington, and of the rights of the minority non-consenting stockholders, and in contemplation of law not the act of The B. Schade Brewing Company, so that its original right of ownership and possession were not changed thereby.

(11) The court erred in dismissing the plaintiff's and intervenor's complaints on the ground that it did not appear that either The B. Schade Brewing Company or its stockholders are ready and willing to pay the amount due on redemption, for the reason that it is not material, not an issue in this cause or a matter on which the rights of the plaintiff or the intervenor as stockholders depend or a question that could be adjudicated in this court and cause or that would effect the validity of the contract and conveyance complained of.

(12) The court erred in dismissing plaintiff's and intervenor's complaints on the ground that the complaints are entirely devoid of equity, for the reasons stated in each of the foregoing Assignments of Error.

(13) The court erred in making an entry of that certain decree on the 3rd day of November, 1920, absolutely dismissing plaintiff's and intervenor's complaints in this action, for the reason that the plaintiff and intervenor had the individual right to bring the action and to the relief prayed for; also for all the other reasons set forth in the foregoing Assignments of Error.

THEORY OF CAUSE.

Before proceeding to a discussion of the several specific assignments of error, it may be well to explain appellants' theory of this cause in relation to the allegations of plaintiff's complaint.

"It is not necessary to allege fraud in terms."
Andrus vs. King County, 1 Wash. 49.

While the word "fraud" is not used in the complaint, the language used charges fraud on the part of defendants as clearly as if it had been used a dozen times, nor would the use of the word add anything to the sufficiency of the allegations in this respect. The facts pleaded—the facts admitted—establish fraud as a conclusion of law. See *N. P. Ry. Co. vs. Clearwater County*, 26 Ida. 455, 465. The alleged violation of the statutes of Washington by the defendants, the acts of the officers of the Brewing Company in excess of the power conferred upon them, is fraud, and the provision in the agreement between the defendant bank, the Brewing Company, and its majority stockholder, president and managing agent, B. Schade, in agreeing and receiving a

virtual bribe in the nature of a release from certain personal obligations and free rent of corporate property, in opposition to the interest of the balance of the stockholders of the corporation that he represented, makes the contract *prima facie*, fraudulent and invalid. The evidence does not disclose the value of the consideration given by the bank to B. Schade personally. It may have been great; it may have been small; one thing is certain, the price was given and that it constituted a part of the moving consideration for the execution of the deed of the property of the Brewing Company so that a partial explanation of counsel who was then acting for the defendant bank of the motives that actuated the defendant, is not sufficient to rid the contract of its viciousness and fraud upon minority stockholders of the Brewing Company.

“The theory of this class of suits is that a stockholder has a right that the operations of the corporation should be kept by the directors within the powers conferred by its charter; every measure which transcends those powers, although done in good faith, violates the rights which inhere in the ownership of stock, and puts the value of the stock itself at hazard. The suit may be brought by a single stockholder suing on his own account alone, or by a stockholder suing on behalf of himself and all others who are similarly situated. The corporation is, of course, made a co-defendant, and any other corporation or person who has joined in the *ultra vires* transaction may also be made a defendant.” See Pomeroy’s Equity Jurisprudence, Sec. 1093.

Appellants contend that the facts alleged in plaintiff's complaint are such as to show that this action can be maintained without showing any notice, request or demand, to the managing body of the Brewing Company or any actual refusal by them to prosecute. But, whatever view may be taken of the allegations of plaintiff's complaint in this respect, it at least must be conceded that it shows a case, if not of compliance with Equity Rule 27, facts, circumstances and conditions sufficient to excuse such compliance. See *Delaware & H. Co. v. Albany & S. R. Co.*, 213 U. S. 449; *Doctor v. Harrington*, 196 U. S. 579, 49 Law Ed. 606. The rule contended for by appellants is also stated in *Pomeroy's Equity Jurisprudence*, Sec. 1095, as follows:

“If the facts as alleged show that the defendants charged with wrong-doing, or some of them, constitute a majority of the directors or managing body at the time of commencing suit, or that the directors or a majority thereof are still under the control of the wrong-doing defendants, so that a refusal of the managing body, if requested to bring suit in the name of the corporation, may be inferred with reasonable certainty, then an action by a stockholder may be maintained without alleging or proving any notice, request, demand or express refusal.”

This proposition seems to be supported by ample authority and has a very extended recognition, both in this country and in England.

In the case of *Mason vs. Harris L. R.*, 2 Ch. Div. 97, 107, Sir George Jessel, M. R., said:

“As a general rule, the company must sue in respect of a claim of this nature, but general rules have their exceptions, and one exception to the rule requiring the company to be plaintiff is that where a fraud is committed by persons who can command a majority of votes, the minority can sue. The reason is plain, as, unless such an exception were allowed it would be within the power of the majority to defraud the minority with impunity.”

See also *Cook on Corporations*, 5th Ed., Sec. 741.

At the trial the defendant introduced in evidence an amendment of said Articles of Incorporation, we assume for the purpose of showing a change of the powers thereof. Now, we contend that the interpretation of that amendment must be in harmony with the objects expressed in its original charter; that an amendment in parliamentary usage and an amendment of Articles of Incorporation are based on different grounds. *Cook on Corporations*, 5th Ed., Sec. 501, says in part:

“The power to make amendments and to repeal and alter charters has been reserved in most of the states of the Union. It is clearly established that the legislature cannot, under this reserved power, amend the charter so as to change the whole character of the enterprise and compel the corporation to proceed under the amended charter. The restrictions of the state constitution still exist, and individuals cannot be forced by the state into new contracts. Moreover, the amendment must not be foreign to the purposes and objects of the original charter.
* * * The Supreme Court of the United States has said that, ‘a power reserved to the

legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."

The power of amendment has its limitations and the procedure which authorizes the increase of its capital stock does not authorize the change of the objects of its original charter. The increase of the capital stock can be made by a vote of two-thirds of the stockholders (See Rem. & Bal. Code, Sec. 3709, 3705), while to change the original charter would require the unanimous consent of all of the stockholders, and the procedure which authorizes the increase of its capital stock does not authorize the change of the objects of its original charter.

Plaintiff's and appellant's theory is, that the affirmative matter found in the defendant bank's answer does not constitute any defense whatever, as the following argument and analysis will show.

Does the fact that the bank loaned the Brewing Company money which was used in its business and not repaid, extinguish the fundamental rights of the stockholders to have the corporate affairs conducted under the provisions of its charter and the statutes of the state creating it? Does the fact that no offer of payment was made by the plaintiff make it inequitable for a court to set aside the conveyance secured under the conditions and circumstances of the case at bar? If the rights of the minority stock-

holders are dependent upon their ability to pay the debts of the corporation, whether contracted in violation of its charter and the statutes of the state, then they are certainly a snare and a delusion. In view of the fact that there is no rebutting testimony to that stipulated in plaintiff's Exhibit 1 (See Trans., p. 116), defendant's second affirmative defense ceases to be a defense. In the third affirmative defense, it is alleged that the defendant loaned the Brewing Company \$50,000, the payment of which was secured by a mortgage on all its property. How can this be a defense to the illegality of the agreement and deed thereunder? It is also alleged that the prohibition act of Washington destroyed the Brewing Company's business and it suspended business without funds to pay any indebtedness or taxes on its property. Under the terms of its charter, the Brewing Company could have still conducted its business in the states of California and Montana, but conceding that the prohibition act destroyed the business of the Brewing Company in the State of Washington, what defense is that to the prima facie invalid agreement and deed thereunder? Did the prohibition act outlaw the fundamental rights of stockholders of the Brewing Company and take from them the right of having the corporate affairs conducted and wound up in accordance with the charter and statutes of their creation? It is further alleged in paragraph 2 of defendant's third affirmative defense, that the mortgage was assigned to the State Finance Company, a subsidiary corporation

of the defendant, which made some disbursements on account of delinquent taxes and insurance and then brought suit to foreclose. That pending suit at the solicitations and earnest request of the Brewing Company, agreement, Exhibit "A" was entered into. Does this furnish a defense against the violation of the rights of the stockholder—an avoidance of the illegal features of the contract—a sufficient excuse for the violation of the law? In paragraph 3 of defendant's third affirmative defense, it is alleged that the Brewing Company was without a defense to the foreclosure suit and the sole purpose of the agreement was to relieve the Brewing Company of the costs of foreclosure suit and sale and from a probable deficiency judgment. Appellants' feel to challenge the proposition that the Brewing Company was without defense to the foreclosure proceeding, in the light of the pleadings in said cause (See Trans., p. 124, 146, and 153), which disclose a defense not only on the part of the Brewing Company, but also on the part of B. Schade, whose alleged mental condition was equally applicable to the conduct of the affairs of the Brewing Company, as to his own personal affairs, but taking it for granted that the defendant bank was, in fact, playing the role of a philanthropist, does it furnish any defense as to the illegality of the agreement or the violation of the charter rights of the stockholders or the violation of the state statutes? It is further shown in paragraph 3 that the acts complained of are in effect an extension of the redemption period.

Does that constitute a defense, even if true? It is also alleged that no offer to repurchase the property under the terms of the agreement was made. Does that fact, if true, constitute a defense? If the contract is void a non-compliance of its terms would not cure its defects. And lastly, in paragraph 3 of defendant's third affirmative defense, it is alleged, we assume by way of defense, that the defendant bank offered to the stockholders of the Brewing Company an opportunity to become proportionate owners of the property conveyed by the Brewing Company, by paying to the defendant in proportion to the number of shares held, and some of the shareholders have accepted said offer. Plaintiff declined the offer. Does this constitute a defense? There seems to be still more ways than one of skinning a cat. This is an example of the genteel "freezing out" process applied to stockholders. An illustration, that those with money can profit by the violation of the charter rights of those without money.

ARGUMENT.

Assignments of Error Numbered 1, 2 and 3.

Assignments of error numbered 1, 2 and 3 are so closely related that brevity and clarity would seem to demand a single discussion of the principle involved, i. e., the power of the Brewing Company, its officers and agents, to enter into the contract and execute the deed referred to in plaintiff's complaint. Appellants, therefore, submit the following propositions on these assignments of error: First, that the

contract set forth in plaintiff's complaint which forms the basis of this action, is fraudulent upon its face, on account of the personal interest disclosed of the officers executing the same in behalf of the Brewing Company, in opposition to the interest of the balance of the stockholders of the company. Second, that the managing body or Board of Trustees of the corporation organized and existing under and by virtue of the laws of the State of Washington, cannot dispose of all of the corporate property in the absence of a charter provision permitting the same, without the unanimous consent of all the stockholders in a regularly called meeting of the stockholders for that purpose, and that any attempt to do so is a fraud upon the non-consenting stockholders, unless such action is taken under the statutory provisions for dissolution. Third, that the president and secretary of a corporation cannot dispose of all of the property of the corporation without the previous authorization of the stockholders and direction of the board of trustees, and that any attempt to do so is a fraud upon the non-consenting stockholders.

The contract set forth in plaintiff's complaint and which forms the basis of this action, is fraudulent upon its face on account of the personal interest of the officers executing the same in opposition to the interest of the balance of the stockholders of the company. On this question I wish to direct the court's attention to Exhibit "A" (See Trans., p. 18-19), which states in part:

“It is further understood and agreed that if during the lifetime of this option * * * B. Schade or Sophia Schade, his wife, shall personally operate a business in said bottling works, that no rental shall be charged therefor as long as said business is conducted by said Schades personally.”

And in paragraph 6 it is sated (See Trans., p. 19) :

“Upon the execution of this option and agreement, that the action pending in the Superior Court of Spokane County, entitled State Finance Company vs. B. Schade Brewing Company, et al, will be dismissed with prejudice, and without costs, and that all notes and said mortgage shall be cancelled and surrendered to said second party, and that no recourse shall be had as against said B. Schade or said Sophia Schade, personally, on account of signing said notes.”

To such an agreement as this, the law imputes fraud and affords relief. In considering this proposition, it must be remembered that there exists fiduciary relationship between the stockholders and the officers of the Brewing Company so that the question of fraud rests on entirely different grounds to that of actual fraud in law, where the scienter must be alleged and proven. Mr. Pomeroy, in his work on Equity Jurisprudence, 3rd Ed., Sec. 955, 966, in discussing this question of constructive fraud, said:

“It is of the utmost importance to obtain a correct conception of the exact circumstances under which the equitable principle now to be examined applies; otherwise the entire discus-

sion of the doctrine will be confused and imperfect. In the various instances described in the preceding paragraphs, there has been an actual undue influence consciously and designedly exerted upon a party who was peculiarly susceptible to external pressure on account of his mental weakness, old age, ignorance, necessitous condition, and the like. The existence of any fiduciary relationship was unnecessary and immaterial. The undue influence being established as a fact, any contract obtained or other transaction accomplished by its means is voidable, and is set aside without the necessary aid of any presumption. The single circumstance now to be considered is the existence of some fiduciary relation, some relation of confidence subsisting between two parties. No mental weakness, old age, ignorance, pecuniary distress, and the like, is assumed as an element of the transaction; if any such fact be present, it is incidental, not necessary—immaterial, not essential. Nor does undue influence form a necessary part of the circumstances, except so far as undue influence, or rather the ability to exercise undue influence, is implied in the very conception of fiduciary relation, in the position of superiority occupied by one of the parties over the other, contained in the very definition of that relation. This is a most important statement, not a mere verbal criticism. Nothing can tend more to produce confusion and inaccuracy in the discussion of the subject than the treatment of actual undue influence and fiduciary relations as though they constituted one and the same doctrine."

"It was shown in the preceding section that if one person is placed in such a fiduciary relation toward another, that the duty rests upon him to disclose, and he intentionally conceals a material fact with the purpose of inducing the

other to enter into an agreement, such concealment is an actual fraud, and the agreement is voidable without the aid of any presumption. We are now to view fiduciary relations under an entirely different aspect; there is no intentional concealment, no misrepresentation, no actual fraud. The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption."

In the case of *Hyams vs. Calumet-Hecla Mining Company*, 221 Fed. 530, the following language is used:

"A minority stockholder may maintain a suit in equity in his own name for relief where the board of directors or a majority of them are acting for their own interest and in a manner destructive of the corporation itself or the rights of other stockholders."

"The Bigelow case does not, however, decide that a court of equity could not, and should not, give appropriate relief for the protection on the part of the controlling corporation to absolutely dominate the controlled company, and the existence of a substantial conflict of interest between such companies accompanied by an actual attempt to accomplish a prejudicial domination. On the other hand, the rule, indepen-

dently of state or national anti-trust statutes, is fundamental that one in control of a majority of stock and of the board of directors of a corporation occupies a fiduciary relation towards the minority stockholders, and is charged with the duty of exercising a high degree of good faith, care, and diligence for the protection of such minority interests. Every act in his own interest to the detriment of the holders of the minority stock becomes a breach of duty and of trust, and entitles to plenary relief from a court of equity. Jackson vs. Ludeling, 88 U. S. (21 Wall.), 616, 624, 625, 22 Law Ed. 429; Jones vs. Electric Co. (C. C. A. 8), 144 Fed. 771, 75 C. C. A. 631; Wheeler vs. Abilene etc. Bldg. Co. (C. C. A. 8), 159 Fed. 391, 394, 395 89 C. C. A. 477, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917; 3rd Clark & Marshall on Corporations, p. 2289."

In the case of *Winthrop Iron Co. vs. Meeker*, 109 U. S. 180, 27 L. Ed. 898, it is said:

"The stockholders of a corporation which has a lease, were operating an iron mine on 50c a ton royalty, being unable to get a renewal of the lease, purchased a majority of the stock of the lessor corporation. They called a meeting which was attended by themselves only, voted an expenditure of \$50,000 from the lessor's capital, to sink a shaft to facilitate the operation of the mine, and directed an 18 year lease of the lessor's mine and property at a royalty of 25c a ton on the ore mined together with certain other advantages to the lessee. Held, on a bill filed by stockholders in behalf of themselves and all other stockholders, that the renewal of the lease was inequitable, and a fraud on the rights of the stockholders not concurring therein."

Our own supreme court says in the case of *Parsons vs. Tacoma Smelting & Refining Co.*, 25 Wash. 497, 498:

“The policy of the law forbids a trustee to assume a double function where there are adverse interests considered. 1 Waterman, Corporations, p. 614, observes that they cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the profits. Morawetz on Corporations lays down the rule that the utmost good faith is required in the exercise of the powers conferred on trustees. In *Munson vs. Syracuse, etc. R. R. Co.*, 103 N. Y. 58 (8 N. E. 355), the court observed of a contract: ‘We are of the opinion that the contract of Sept. 14, 1875, is repugnant to the great rule of law which involves all contracts made by a trustee or fiduciary, in which he is personally interested, at the election of the party he represents. There is no controversy as to the facts bringing the case as to Munson within the operation of the rule. He and his associates are dealing with a corporation in which Munson was a director, in a matter where the interests of the contracting parties were or might be in conflict. The contract bound the corporation to purchase; and the corporation in assuming the obligation and binding itself to pay the price primarily agreed upon between the plaintiffs and Magee. He stood in the attitude of selling as owner and purchasing as trustee. The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair.’”

Quoting again from Pomeroy on Equity Jurisprudence, Sec. 1075, Ill, *To act with good faith.*

The duty not to deal with trust property for his own advantage, says:

/ “Absolute and most scrupulous good faith is the very essence of the trustee’s obligation. The first and principal duty arising from the fiduciary relation is to act in all matters of trust wholly for the benefit of the beneficiary. The trustee is not permitted to manage the affairs of the trust, or to deal with trust property, so as to gain any advantage, directly or indirectly, for himself, beyond his lawful compensation. * * * It is equally imperative upon the trustee, in his dealing with trust property, not to use it in his own private business, or to take any incidental profits for himself in its management and not to acquire any pecuniary gains from his fiduciary position.”

Sec. 1077, Id. 3, *The duty not to accept any position or enter into any relation, or do any act inconsistent with the interests of the beneficiary.* “This rule is of wide application, and extends to every variety of circumstances. It rests upon the principle that as long as the confidential relation lasts the trustee or other fiduciary owes an undivided duty to his beneficiary, and cannot place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of his *cestui que* trust. The rule applies alike to agents, partners, guardians, executors and administrators, directors and managing officers of corporations as well as to technical trustees. The most important phase of this rule is that which forbids trustees and all other fiduciaries from dealing in his own behalf with respect to matters involved in the trust, and this prohibition operates irrespectively of the good faith or bad faith of such dealing. It is therefore a gross

violation of his duty for any trustee, or director, acting in his fiduciary capacity, to enter into any contract with himself connected with the trust or its management; such a contract is voidable, and may be defeated or set aside at the suit of the beneficiary."

"Breach of duty and abuse of fiduciary obligation do not necessarily involve intentional moral delinquency. If the act amounts to what the law considers a breach of trust and disregard of duty, it is sufficient."

Hyams vs. Calumet Hecla Mining Co., 221 Fed. 559.

In considering the law on the question of the powers of the Brewing Company, its officers and agents, the facts must be clearly kept in mind. That B. Schade was the President and L. R. Stritesky the Secretary, and that they together with Sophia Schade, the wife of B. Schade, constituted the Board of Trustees. That the board of trustees constitute the governing body of the company, and that they as a board never authorized the President and Secretary to execute the deed and agreement in question. (See, Trans. p. 55). But it is contended that while there was no preauthority, that there was a ratification by the Board of Trustees at their meeting of February 4, 1918. (See, Trans. p. 56). If it be admitted that B. Schade and wife were disqualified from entering into a contract in behalf of the corporation where their personal interest was involved, for like reason they would be unable to ratify the contract. On June 9, 1921, the Supreme

Court of the State of Washington handed down an important decision involving the questions herein discussed, and affirming the principles announced in the case of *Parsons v. Tacoma Smelting & Refining Co.*, *Supra*. The case is entitled *Sacajawea Lumber and Shingle Co. v. Skookum Lumber Co., et al.* 198 Pac. 1112, and the following language is used:

“A director of a corporation occupies a strictly fiduciary capacity and it is always his duty to fully represent the interest of the corporation of which he is a director. While there is some authority to the contrary, the majority of the courts and text writers hold that a director in a private corporation has no power to vote upon a proposition wherein his individual interest is opposed to that of the corporation which he represents. At page 92, 14 (A) C. J., the rule is stated as follows:

‘A director who is disqualified by personal interest from voting on a particular matter before the meeting cannot be counted for the purpose of making a quorum or a majority of the quorum. The act done is invalid where his presence is necessary to constitute a quorum, or where his vote is necessary to the passage of the resolution, regardless of the fairness or good faith of the transaction’ * * *

‘In the case of *Burns v. National Mining, Tunnel & Land Co.*, 23 Colo, App. 545, 130 Pac. 1037, the court said: (

‘A board of directors of a solvent corporation may borrow money from one or more individual members of the board, and give the corporation’s note for it, and even mortgage the cor-

porate property to secure it, where the transaction is in good faith * * * If the presence and vote of the director loaning the money is necessary to constitute a quorum, and to make a majority upon such vote, however, the act is voidable at the instance of the corporation or its stockholders. The trust relation existing between the directors and the stockholders of a corporation ought not to permit such an act, and a court of equity will scrutinize all contracts made in this way and set them aside, regardless of the good faith of the transaction.'

'At 10 Cyc. P. 790, the rule is stated as follows:

'A director cannot with propriety vote in the board of directors upon a matter effecting his own private interest any more than a judge can sit in his own case; and any resolution passed at a meeting of the directors at which a director having personal interest in the matter voted will be voidable at the instance of the corporation of the shareholders, without regard to its fairness, provided the vote of such director was necessary to the result.'

'See, also, the following cases to the same effect:

*Heublien v. Wight, 227 Fed. 667; Curtin v. Salmon River etc. Co. 130 Cal. 345, 62 Pac. 552, 80 Am. St. 132; O'Rourke v. Grand Opera House Co., 46 Mont. 609, 133 Pac. 965; United States Rolling Stock Co. v. Atlantic & Great Western R. Co., 34 Ohio St. 450, 32 Am. Rep. 380. Other cases involving this question may be found in the cases above cited.

'But the question under discussion is not a new one to this court. In the case of Parsons v. Tacoma Smelting & Refining Co., 25 Wash. 492, 65 Pac. 765, we said: ' '

Appellants hardly feel justified in making further citation from this case, but ask this Court's consideration of the same on the questions involved in these three assignments of error.

“One dealing with the officers and agents of a corporation created by statute is bound to take notice of the extent of their authority as limited by the act of incorporation.”

12 Century Digest, Corporation, Sec. 1721.

“One who deals with officers or agents of a corporation is bound to know their power and the extent of their authority. The corporation is only bound by their acts or contracts which are within the scope of their authority.”

12 Century Digest, Corporations, Sec. 1720; *McCormick v. Market Nat'l Bank*, 165 U. S. 538.

In considering the second proposition, *supra*, it should be borne in mind that the Brewing Company was organized for the manufacture and sale of beer and not for the building and selling of brewery plants. It has been held in this state that mining corporations organized for the buying and selling of mining property could sell all its property in the regular course of business, where such power was expressed in its charter. Such were the holdings in *Pitcher vs. Mining Co.*, 39 Wash. 608; *Lang vs. Mining Co.*, 48 Wash. 167; *Logie vs. Mining Co.*, 106 Wash. 208. But the rule announced in those cases are certainly not applicable to the case at bar, for no such power is expressed in the Brewing Com-

pany's charter. The rule applicable and followed in the State of Washington is expressed in the cases of *Parsons v. Tacoma Smelting and Refining Co.*, 25 Wash. 497-8; and *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 27. It was never intended in the later cases to overrule or modify the doctrine therein stated, which is in harmony with reason, the common law, and the great bulk of adjudicated cases. See, *Sacajawea Lumber & Shingle Co., v. Skookum Lumber Co. et al.*, 198 Pac. 1112. By taking into consideration the admissions contained in defendant's answer to the objects of the Brewing Company, which must be assumed as controlling, it becomes apparently a simple matter to arrive at the proper measure of the rights and obligations of its stockholders. It is stated in 10 Cyc. 406:

“The general rule is that the relation between a corporation and a shareholder, being one of contract, any legislative enactment which without his assent authorizes a material or fundamental change in the power or purpose of the corporation, not in aid of the original object, if acted upon by the corporation, is not binding upon him.”

“Selling the entire corporate property to another corporation, or what is in practical effect the same thing, leasing it for 999 years, is such a fundamental change as releases a dissenting subscriber. If this cannot be done with the authority of the legislature so as to bind a dissenting shareholder, for stronger reasons it cannot be done without the authority of law.” *Id.*, 408.

“The legislative change in the character of the enterprise which will thus release a subscriber, has been often described as material, fundamental or radical; but it is more frequently described by the use of the word ‘fundamental.’ If it vitally and radically affects rights established and fixed by charter, it cannot be enforced upon an unwilling shareholder.” *Id.*, 408.

It is said in the case of *Parsons vs. Tacoma Smelting & Refining Co.*, 25 Wash. 497, 500:

“The articles of incorporation of a corporation constitute a contract entered into by all the stockholders, whose terms cannot be abrogated without the consent of all, hence, a lease of the corporate property authorized by a majority vote of the stockholders is voidable at the suit of a non-consenting stockholder where the articles of incorporation contain no express power to make such lease.”

“Each individual stockholder assumed the liability of the payment of his subscription to the capital stock in money or moneys’ worth and the corporation engages to carry on the business for which it was organized.”

“The stockholders have equal rights to participate in the profits of the business accruing to the value of the stock owned by each, and each stockholder is entitled to the protection of his charter rights. He may insist that the business be conducted according to the articles; and while the wishes of the majority of the stockholders are potent in the administration of all of the business of the corporation, and where exercised without fraud or oppression, are controlling upon the minority, yet the action of the majority cannot prevail where it impairs the contract right of a stockholder.”

Every reason that may be advanced for the formation of corporate organizations furnishes an appeal for the enforcement of the contractual obligation of the individual stockholder and the corporation. The methods of procedure must be observed and enforced, for they are a part of the fundamental rights that inhere in the ownership of stock.

Taking up now the third proposition, appellants contend that one of the fundamental contract rights of each shareholder of the Brewing Company, which we contend has been violated in this case, is to have the power of the corporation exercised by the stockholders and board of trustees as designated by the statute of its creation (See, Secs. 3708 and 3686, Rem. & Bal. Code). The stockholders and board of trustees must act as such and not individually, or in any other capacity, therefore, formal action is required in the exercise of corporate power. The rule announced by the Supreme Court of the United States in the case of *De La Vergue Refrigerating Co. vs. German Savings Institution*, 175 U. S. 40, 44 L. Ed. 65, is applicable and illustrative of plaintiff's contention, and is as follows:

“A conveyance of the assets of a corporation is not within the power of the stockholders, even though they all sign it, without formal action at a meeting held for that purpose.
* * * In addition to this, however, there was no corporate action taken authorizing any such conveyance by the corporation, and such conveyance would not, under the law of Illinois, which conforms in this particular to the general

law, be within the power of the stockholders even though they all signed it without formal action at a meeting held for that purpose." (Many authorities cited).

It is stated in the case of *Humphreys v. McKissock*, 140 U. S. 313, 35 Law Ed. 475:

"The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber or transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law. In *Smith v. Hurd*, 12 Met. 385, the relation of stockholders to the rights and property of a banking corporation are stated with his usual clearness and precision by Chief Justice Shaw, in speaking for the Supreme Court of Massachusetts, and the same doctrine applies to the relations of stockholders in all business corporations. Said the Chief Justice: 'The individual members of a corporation, whether they should all join or each act separately, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose in action; could not collect any debt or discharge a claim or release damages arising from any default, simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined.'

The exercise of the rights and powers of the Brewing Company are well and definitely defined by the statutes of Washington,—the statutes of its creation,—and by those statutes the exercise of general corporate power is confined to a board of trustees, See, Sec. 3686 Rem. & Bal. Code, while the power of dissolution rests in the hands of the stockholders, See, Sec. 3708, Id. Plaintiff and intervenor therefore contend that the deed and contract set forth in their bill of complaint should be declared illegal and void; first, because no action was taken by the board of trustees or its stockholders in the premises, either directing the execution of the conveyance or its ratification. The mere announcement by its unauthorized officers amounts to neither. Plaintiffs have alleged and proven that no action was taken by the board of trustees or stockholders in the matter of the execution of the deed and agreement conveying all of the property of the Brewing Company. That this extraordinary transaction, involving the very existence of the corporation, should not be considered in the same light that every day business transactions of a going concern are considered, is self evident. It is not a question of the power of the officers of the Brewing Company to liquidate the debts of the company in the due course of business, but a question of the dissolution of the corporation, by an unauthorized sale of all its corporate property, in violation of the plain provisions of the statute and the articles of incorporation of the company, so that the same rule of

reasoning does not apply, for no estoppel or part performance can sustain a contract that is forbidden by a charter or is contrary to statute. In discussing the question of the enforcement of such contracts, Cook on Corporations, 5th Ed. Sec. 681, says in part:

“The courts differ widely in their decisions on the enforceability of *ultra vires* contracts. * * * In the Federal Courts, on the contrary, the ordinary rules against *ultra vires* contracts is upheld in all its rigor and applied with all its severity. The tendency of modern jurists to relax on that subject finds no favor in the federal courts.”

In note 5 to said section it is said:

“The doctrine of *ultra vires* by which a contract made by a corporation beyond the scope of its corporate power, is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds; the obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interests of the stockholders not to be subject to the risks which they have undertaken, and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law.” *McCormick v. Market Bank*, 165 U. S. 538, 549. * * * No estoppel or part performance can sustain a contract that is forbidden by charter or is contrary to public policy.” See, also, *Oregon Railway and Nav. Co. vs. Oregonian Railway Company*, 130 U. S. 1; *Penn. R. R. Co. v. Keokuck etc. Co.*, 131 U. S. 371, 384, 389.

ASSIGNMENT OF ERROR NUMBERED 4.

Assignment of error numbered four (4), goes to the question of the suspension of the corporate existence of the Brewing Company, on the sale of all its property to the bank. Aside from other considerations, the statutes of the State of Washington controlling the creation and existence of corporations, provides the method of dissolution, which of course, is exclusive, and becomes one of the charter rights of the stockholders, and cannot be disregarded without unanimous consent of the stockholders. As previously stated, it is not a question of the power of the officers of the Brewing Company to liquidate the debts of the company in due course of business, but a question of the dissolution of the corporation, by sale of all its corporate property, in violation of the plain provisions of its articles of incorporation and the statute relative to procedure. See, Sec. 3708 Rem. & Bal. Code, which in part is as follows:

“Any corporation formed under this chapter may dissolve and disincorporate itself by presenting to the superior judge of the county in which the office of the company is located a petition to that effect, accompanied by a certificate of its proper officers, and setting forth that at a meeting of the stockholders, called for the purpose, it was decided, by a vote of two-thirds of all the stockholders, to disincorporate and dissolve the corporation.”

In contruing a like statute from the state of Ore-

gon, the Supreme Court of the United States held, that it was not a part of the general powers of a corporation. See, *Oregon Railway & Nav. Co. v. Oregonian Railway Co.*, 130 U. S. 35, and stated,

“It does not need argument to show that such provision, made for the dissolution of a corporation by the voluntary act of the incorporators, providing for the disposition of its property when the resolution to that effect has been adopted, whether by distribution of dividends on its profits or the sale of shares of stock, or for any other disposition of its effects compatible with law, is not applicable to and cannot be intended to confer upon corporations continuing in existence, or which, like these companies, contemplate in the very contract entered into a continuance of more than ninety-six years the power to dispose of their corporate power and franchises, much less the power to lease them for an indefinite period to others.”

The Supreme Court of the State of Washington in the case of *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 497-8, said.

“Reason as well as authority, we think, will sustain the proposition that neither a majority of the stockholders nor the directors of a corporation as such, without special authority for the purpose, can generally do an act which, to all intents and purposes, terminates the corporation.”

“It is conceded that at common law a corporation had no power to dissolve excepting by universal consent of the stockholders, and that an injunction would be granted upon the appli-

cation of a single stockholder to prevent such dissolution.” *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 27.

“The sale of the entire property of a corporation without compliance with the statute is a dissolution.” *Id.* 24.

As stated in the case of *Andrews v. National Foundry & Pipe Works*, 76 Fed. 171, the Washington decision, above cited,

“Being the first direct ruling of the Supreme Court of the state upon the exact question under consideration, must be regarded as establishing a construction of the statute which the federal courts will follow without further inquiry.” (See, — numerous authorities there cited).

There is no question in relation to the fact of the sale of all the property of the Brewing Company, under the terms of the contract and admissions of the defendants, without any attempt at a compliance with the statutes of dissolution. Here then is fraud incontestably established as a conclusion of law.

ASSIGNMENT OF ERROR NUMBERED 5.

Assignment of error numbered five (5), is, that the trial court erred in holding that the amendment to the state constitution, prohibiting the sale and manufacture of intoxicating liquors, authorized the sale and conveyance of all the property of the Brewing Company to the defendant bank. The trial Court in arriving at this conclusion stated, “The

business which the Brewing Company was organized to promote * * * became unlawful by reason of the amendment to the state constitution.” The fact that the Brewing Company was organized to conduct the same class and kind of business in the states of California and Montana, was totally disregarded, so that the Court arbitrarily assumed without the slightest evidence to support the proposition, that the Brewing Company was no longer a going concern and that in a sense it was insolvent. While contending that these conclusions are not justified by the evidence, yet, for the purpose of meeting the question fairly, assuming the correctness of the conclusions of the trial Court, the question arises, does the fact that one corporation owes another corporation, justify the absolute disregard of the statutes and remove all restraints from the action of its officers? Does the fundamental rights of the stockholders cease immediately on the corporation becoming indebted? Does such a condition leave the officers at liberty to pay the debt with *all* the corporate property, regardless of the amount of property or indebtedness? Appellants contend, that corporate indebtedness must be paid but that such payment must be made in accordance with the statutory provisions creating the corporation, and in conformity with the fundamental rights of the stockholders. That if the conclusions of the trial Court be taken as correct, that after the adoption of the constitutional amendment the Brewery Company was no longer a going concern, then it should

have been dissolved in accordance with the statutes of the state and its articles of incorporation, and not in a manner in violation thereof, however seductive it may be made to the personal interest of the controlling stockholders and managing officers thereof, as illustrated in this cause. In the case of *Mason v. Pewambie Mining Co.*, 133 U. S. 50, 33 Law Ed. 524, the well recognized rule is stated:

“The rights of stockholders in regard to the assets of an expiring corporation do not differ from those of partners on the dissolution of the partnership. * * * On the dissolution of the corporation the majority cannot place a valuation on the assets of the corporation any more than can a minority of the stockholders, and each are entitled to have all the assets sold and proceeds divided. * * * Such right in the absence of an agreement to the contrary, is to have the property converted into money, and its value ascertained, by sale, even though a sale is not necessary to the payment of debts.”

In the case of *Hunt v. American Grocery Co.*, (C. C.) 81 Fed. 532, the following language is used:

“The directors of the G. Co., a corporation, organized under the laws of New Jersey to conduct a manufacturing and mercantile business, called a meeting of the stockholders to consider the propriety of a sale of the business. Less than one-third of the stock was represented at the meeting, but a resolution was passed by a large majority of the stock represented, instructing the directors to dispose of the business of the company on such terms as they should deem best. Held, that the statutes fully pro-

vided for the winding up of the corporation in case its business was unprofitable, or it was obliged to suspend for a want of funds, the directors should be enjoined, at the suit of a stockholder, from disposing of the assets, so as to prevent the corporation from carrying out the object of its incorporation."

The trial Judge in citing the case of *Lange v. Reservation Mining and Smelting Company*, 48 Wash. 167, which is not analogous to the case at bar, draws an incorrect inference from the dicta, when he states, (See, Trans. p. 44).

"It may be that a solvent private corporation conducting a successful business in this state may not sell out or abandon the corporate enterprise over the protest of a minority stockholders."

Appellants contend that, under the statutes of the state of Washington, the rights of the stockholders are not contingent upon the solvency or success in business of the corporation. The stockholders have a fundamental right to have the affairs of the corporation conducted in accordance with the mandates of the statute, and that right does not depend on its solvency or insolvency, upon its debts or its credits, whether it be successful or not successful, but exists with full force and virtue under all conditions that a corporation may find itself. The very idea of such modifications on the rights of stockholders is not only abnoxious to a fair intendment of the statutes but to every principle of justice and equity.

ASSIGNMENT OF ERROR NUMBERED 6.

Assignment of error numbered six (6) goes to the holding of the trial Court, that the inability of the Brewery Company to pay its debts as they became due in the ordinary course of business, clothed the President and Secretary with power to convey all its corporate property to one creditor regardless of its value, the personal inducements extended to the officers making the conveyance by the bank and the statutes of the state concerning the conduct of corporate affairs. On this question the trial Court stated,

“After the adoption of this amendment the corporation was no longer a going concern, and if not insolvent in the sense that its debts exceeded its assets, it was at least insolvent in the sense that it could not pay its debts as they became due in the ordinary course of business. Finding itself in this plight, only one course was open to it. That was to dispose of its property, pay its debts, and distribute the surplus, if any, among its stockholders. No other course has been suggested by counsel, and no other course suggests itself to the Court. The power of the trustees to do this without the consent of all the stockholders, so long as they acted in good faith, does not in my opinion admit of question.”

It will be observed that the trial Court assumes that the board of trustees of the Brewing Company, acted in the premises, when the facts show, that the president and secretary alone acted personally and not as a board of trustees. In passing on this as-

signment of error it is necessary to determine the real questions involved in this cause. It is plainly evident that the paramount question within the per-view of the trial Court, is the payment of the indebtedness to the bank. All other questions are not only subordinated to the lone question of the liquidation of the debt to the bank, but absolutely disregarded. The fact is not mentioned and apparently not considered, that all of the corporate property essential for carrying on corporate business, of the value of some \$350,000.00 was turned over by the President and Secretary of the Brewing Company, in discharge of the personal obligations of its President and other inducements mentioned in plaintiff's Exhibit "A", for the equivocal indebtedness of some \$63,000.00. No mention is made of the statutes prescribing the method of procedure under the stated conditions to accomplish the very purpose suggested by the trial Court, i. e., the payment of the corporate indebtedness and the closing up of its affairs, so that the rights of the stockholders might be safeguarded. The defense of indebtedness to the bank is made to overshadow all other questions, including constitutional rights of contract, state statutes and provisions of articles of incorporation. It in fact constitutes the keynote of the trial Court's decision, despite the issues presented by the pleadings and proof. Appellants therefore, once more re-assert, that the question is not, has the governing body of the Brewing Company authority to pay its debts? but, under the pleadings and proof in this cause, has

the Secretary with the President who owns the majority of the Capital Stock and who ran the corporation as he pleased, the right to dissolve the corporation at will regardless of the articles of incorporation, the rights of the minority stockholders, and the statutes of its creation? The appellants answer, that the president and secretary either as such officers, or in their capacity of trustees, have no such power or authority. The rights of the body of stockholders to dissolve a corporation cannot be questioned, or the statutory procedure disregarded. See, Sec. 3708, Rem. & Bal. Code. The question of dissolution is the one involved under the pleadings and proof, and not the subterfuge of payment of debt raised by the defendant and solely considered by the trial Court; for the payment of corporate debt must perforce be subject to the statutory provisions and not in violation thereof. Under the statutes of Washington the right or power of dissolution is given to the stockholders and cannot be regarded as one of the general powers of a corporation. See, *Oregon Railway & Navigation Co. v. Oregonian Railway Co.*, 130 U. S. 35.

ASSIGNMENT OF ERROR NUMEBRED 7.

The seventh assignment of error goes to the question of fraud. The trial Court held that no fraud was committed or contemplated in the execution and procurement of the deed and contract between the Brewing Company and the bank. As heretofore

stated in appellants theory of this cause, "it is not necessary to allege fraud in terms," where the language used in the complaint charges fraud on the part of the defendants. The facts alleged from which the ultimate facts of fraud must be drawn are plainly unmistakeably alleged, proven and admitted. Thus the contract, plaintiffs' Exhibit "A" is *prima facie* invalid. First, because this extraordinary instrument does not even recite the preliminary steps necessary and essential by the stockholders and trustees to convey all the property of the corporation. Second, because the contract discloses the personal interest of the parties executing the same on the part of the Brewing Company. Third, because it is in open violation of the statutes of the state of Washington.

Under the statutes of Washington Sec. 3686 Rem. & Bal. Code, it is expressly provided that the power of a corporation shall be exercised by a board of not less than two trustees. No suggestion is made in the contract that the president and secretary were acting on the direction of the board of trustees. If the contract was signed "The B. Schade Brewing Co., by Don Quixote and Rip VanWinkle" its invalidity would not be more apparent, under the statute. But for the purpose of argument, disregarding the Washington statute, *supra*, the general rule seems to be and is supported by the great weight of authority, that a president has no inherent power to represent or contract for a corporation, even in every

day business transactions; aside from where its corporate existence is involved. See, Cook on Corporations, Sec. 716. It should be borne in mind, that the very nature of the contract removes it from the category of the every day business transaction, and places it in a class by itself, and thereby disposes of any presumption of power and authority of officers and agents of corporations in the usual and ordinary business transactions, indulged in in some jurisdictions.

The second proposition suggested that the contract discloses the personal interest of the officers executing it on behalf of the Brewing Company, is in direct violation of the rule "which forbids trustees and all other fiduciaries from dealing in their own behalf with respect to matters involved in the trust, and this prohibition operates irrespectively of the good faith or bad faith of such dealing. It is therefore a gross violation of his duty for any trustess or director, acting in his fiduciary capacity, to enter into any contract with himself connected with the trust, or its management;" See, Pomeroy's Equity Jurisprudence, Secs. 1075, 1077; Hyams v. Calumet-Hecla Mining Co., 221 Fed. 530, and the cases therein cited, and Parsons v. Tacoma Smelting and Refining Co., 25 Wash. 497-498. That the officers of the Brewing Company, have subscribed their names to plaintiffs' Exhibit "A" which shows a palpable violation of duty and breach of trust. The facts also show that the defendant bank was privy

to the fraud, in fact participated in it. Appellants submit that the transaction would not have been more inequitable by the bank agreeing and giving the sum of ten thousand dollars to Schade and wife personally for the execution of the deed. That the bank was a party to the fraud, by agreeing to give to Schade and wife the free use of the property for eighteen months and releasing them from all liability on certain notes sued upon by the State Finance Company, just as much as though the consideration had been in cash, and of such amount as would have tempted the cupidity of the managing officer of the Brewing Company to violate his duty and commit a breach of trust. In defining the term "breach of trust" Pomeroy in his work on Equity Jurisprudence, Sec. 1079, says:

"It might be supposed that the term 'breach of trust' was confined to willful and fraudulent acts which have a *quasi* criminal character, even if they have not been made actual crimes by statute. The term has, however, a broader and more technical meaning. It is well settled that every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. The term therefore includes every omission or commission which violates in any manner either of the three great obligations already described; of carrying out the trust according to its terms, of care and diligence in protecting and investing the trust property, and of using perfect good faith."

That the officers of the Brewing Company committed a breach of trust—a violation of duty—in accepting what must be regarded as a virtual bribe on the part of the bank, and together committed a fraud on the minority stockholders of the Brewing Company can hardly be gainsaid.

That the contract is in open violation of the statutes of Washington is evident from the contract itself as well as the admitted facts in the cause, and that both parties fully understood that it meant a conveyance of all the property of the Brewing Company, and necessarily a suspension of its corporate functions is equally clear. Both the officers of the Brewing Company and the bank, knew that no effort had been made to comply with the provisions of Sec. 3708 of Rem. & Bal. Code, and both parties must be presumed to know the law as announced by the Supreme Court of Washington, to wit; “The sale of the entire property of a corporation without compliance with the statute is a dissolution.” See, *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 24. Appellants assume that it will not be seriously contended, that the president and secretary, even under the stated conditions of this cause, had a right to dissolve the corporation. The right of stockholders to a statutory dissolution is fundamental. Necessarily the violation of the right is an *ultra vires* act and therefore a fraud upon the corporation and its stockholders. In the case of *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 500, it is stated,

“The authority of the board of directors is derived from the unanimous agreement of the stockholders, expressed in their charter or articles of association; and hence those powers which it is intended shall belong to the directors exclusively cannot be impaired by the majority, or any other agent. Each agent is supreme within the scope of the powers delegated to him by his principal.”

The statutes of the state of Washington reserve the right of dissolution in the stockholders and prescribe the method to be pursued by them. It is therefore a charter right, “and each stockholder is entitled to the protection of his charter rights. He may insist that the business be conducted according to the articles.” *Parsons v. Tacoma Smelting & Refining Company, Supra.*

In this case the contract shows that the powers and functions of the stockholders and board of trustees have been usurped by the president and secretary. This is established by the contract itself, viewed in the light of the admitted value of the property, the statutes of the state of Washington, the holdings of the Supreme Court of the State, the fiduciary relationship of the parties and the personal adverse advantages and concessions accruing to the officers of the Brewing Company. These considerations conclusively show that fraud was committed and contemplated in the execution and procurement of the deed and contract in question. While it may be admitted that the contract itself shows, that it was not the intention of the parties to

dissolve the Brewing Company, such however was the result, and only emphasizes the fact of the usurpation of power and violation of the statutes by the president and secretary. It is evident that the parties to the contract contemplated a continuance of the existence of the Brewing Company, if not for a period of thirty-five years under the statute, at least for a year and six months, until the expiration of the redemption period mentioned in the contract, so, that while it becomes apparent that it was not the intention to dissolve the corporation, its dissolution was a necessary result of compliance with the terms of the contract, which makes it *ultra vires*. See, *Oregon Railway and Navigation Company v. Oregonian Railway Co.*, 130 U. S. 35.

ASSIGNMENT OF ERRORS NUMBERED 8 AND 9.

Assignment of error numbered eight (8) presents the proposition advanced by the trial Court, that the carrying out of the terms of an *ultra vires* or invalid contract cures its defects, nullifies the rights of the minority stockholders, disposes of the rule that, "one who deals with officers or agents of a corporation is bound to know their power and extent of their authority," and the doctrine of *ultra vires* by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void.

“A contract of a corporation which is *ultra vires* in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred on it by the Legislature—is not voidable only, but is wholly void, and of no legal effect. The objection to such a contract is not merely that the corporation ought not to have made it, but that it could not make it. Therefore a contract cannot be ratified by either party, nor can performance on either side give rise to any obligations thereunder.” *Central Transp. Co. v. Pullman’s Palace Car Co.*, 139 P. S. 24.; *Durkee v. People*, 155 Ill. 354, 40 N. E. 626; *National Home Building and Loan Ass’n v. Home Saving Bank*, 181 Ill. 35, 54 N. E. 619, 621; *California Bank v. Kennedy*, 167 U. S. 362, 367; *Directors etc., of Ashbury Ry. Carriage & Iron Co., v. Riche*, L. R. 7 H. L. 653; *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059, 1061; *G. V. B. Min. Co. v. First Nat. Bank of Hailey (U. S.)* 95 Fed. 23, 33, 36 C. C. A. 633.

The dissolution of a corporation is not a “corporate power” in the usual acceptation of the term, or in the statutory sense in defining “corporate power,” but is a right reserved to the stockholders. So that the question of the satisfaction of the mortgage as presented in assignment of error numbered eight, is not material to the issues presented in the pleadings, nor does it present an estoppel or suspend the rights of the minority stockholders or the corporation in the premises.

The same principles and conclusions are applicable to appellants’ Assignment of Error numbered

nine (9), and this Court is respectfully asked to give them consideration in connection therewith. As applicable to both assignments of error, appellants beg leave to submit the following statement from *Central Transportation Co. v. Pullman's Car Co.* 139 U. S. 55.

“In *Thomas v. Railroad Co.*, already cited, Mr. Justice Miller, while admitting in general terms that ‘in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the property or the money so transferred,’ and that ‘the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it,’ yet in the same connection, and in the most emphatic words, said that in the case before the court, of a contract forbidden by public policy and beyond the powers of the defendant corporation, it was its legal duty, a duty both to its stockholders and to the public, to rescind and abandon the contract at the earliest moment, and the performance of that duty, though delayed for several years, was a rightful act when done, and could give the other party no right of action; and to hold otherwise would be ‘to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.’ 101 U. S. 86.”

ASSIGNMENT OF ERROR NUMBERED 10.

Assignment of error numbered ten (10) is based on the ground of the holding of the trial Court, that, the utmost relief that could be properly granted the Brewing Company, or its stockholders in a suit of this character, would be the right of redemption. Here is again illustrated the narrow boundary of what the trial Court considered the only controlling question, i. e., the alleged debt of the Brewing Company to the defendant bank. Rights of the parties to this action are based and determined in the view of the lower Court on this single consideration. That it must necessarily constitute an erroneous basis becomes apparent from the fact that no issue was made or presented on the question by the pleadings; and obviously could not be directly material in passing on the *ultra vires* acts of the President and Secretary of the Brewing Company, in arbitrarily disposing of all its property of the value of more than \$350,000.00 for an alleged indebtedness of some \$63,000. The amount of indebtedness is not and cannot be made a material issue in this cause, but, before passing on the question and amount of redemption and making it a basis of decision, it would appear to be at least fair and equitable to judicially determine in the cause, the actual amount of indebtedness and not to irrevocably accept the one-sided statement of officers, whose own personal interests are admittedly involved while acting beyond the scope of their power. It will be observed, that, Mr. Justice Miller,

whose preeminence as authority on corporation law is universally admitted, did not predicate the duties of the corporation and its stockholders in the foregoing citation under assignment of errors numbered eight and nine, on the proposition that they should pay all the debts of the corporation before attempting to have an *ultra vires* contract set aside. It is only stating a truism to say that any act which transcends the power conferred by law on a corporation, even though done in its name by officers or agents, is not the act of the corporation. To hold otherwise would be to make limitless the power of a statutory creation limited by the statute itself. The acts of the officers and not the statutory regulation would control. Thus, the constitutional provision against the impairment of contractual obligations existing between corporations and its stockholders would be set at naught, and legislative enactments for the safeguarding of such right would cease to be of force or effect.

ASSIGNMENT OF ERROR NUMBERED 11.

Appellants' eleventh assignment of error is that the Court erred in dismissing plaintiff's and intervenor's complaints on the ground that it did not appear that either the Brewing Company or its stockholders are ready and willing to pay the amount due on redemption of the claim of the bank. Here again is illustrated the controlling influence with the trial Court. Why a court of equity should resolve itself into a partisan collection agency in

this particular instance, and ignore all other questions actually presented, is incomprehensible. Is it to be held in this action, that the plaintiff stockholder with fifty shares of capital stock whose par value is \$5,000. must be prepared to pay the debt of the corporation amounting to possibly twenty times the amount, before she can insist on the enforcement of her rights as a stockholder, the right of the corporation and the duties of corporate management in a court of equity? If it were in law a condition precedent to the institution of a suit by the stockholders or corporation that all its debts be paid as per the provisions of an *ultra vires* contract, before the contract could be set aside or abandoned, then the plaintiff and intervenor would of course have no standing in court. But, such is not and never has been the law, as shown by the authorities herein cited. It is most probable and reasonable that the amount of interest of any minority stockholder, or their inability to pay the debts of the corporation would be a more effectual estoppel than any principal of law, regardless of the merits of their contention. But the debts of the Brewing Company to the bank, is not a question in issue in this cause or within the jurisdiction of this Court, and cannot be allowed to effect the validity of the contract and conveyance complained of, nor can it be allowed to becloud the true issue. The seeming solicitude of the trial Court for the payment of the bank before its right to retain all the property of the Brewing Company valued at \$350,000.00 can be questioned,

seem to have caused a disregard of the real questions involved. In the case of Central Transportation Company v. Pullman's Car Co., 139 U. S., the same contention was made on the question of the validity of a lease, at page 31, to wit:

"If the decision of the court below is sustained, it will retain everything that is valuable, and which it could never have acquired but for the lease, and will be obliged to return nothing but worthless cars."

and on page 37,

"In conclusion we urge upon the court that the decision of the court below leaves the plaintiff in a most deplorable condition. Its contracts, which were valuable, are gone. The defendant under the lease is now in possession of all the contracts which were formally owned by the plaintiff. It has been denied the right to recover the sum agreed to be paid in the lease because the contract being against public policy. If it cannot recover upon the contract, how can it recover upon a *quantum meruit*? If it has no action at law how can it have any relief at equity?"

But such contentions and such questions did not effect the Supreme Court of the United States. The question involved was the validity of the contract, and on this question the Court stated, see page 60,

"No performance on either side can give an unlawful contract any validity, or be the foundation of any right of action upon it."

Numerous cases cited in argument of assignment of error numbered eight are to the same effect.

ASSIGNMENT OF ERROR NUMBERED 12.

Assignment of error numbered twelve (12) is based on the holding and dismissal by the trial Court of plaintiff's and intervenor's complaint on the ground that they are entirely devoid of equity. The right of the defendant bank, if it ever had any, has not grown out of the deal involved in this action, i. e., the deed and agreement, so that rule requiring an offer to do equity is not applicable in this action on that ground alone. The defendants are asking no redress except the affirmation of what plaintiffs and appellants contend to be a fraudulent and *ultra vires* deed and contract, and if the Court should hold that the contract was either fraudulent or *ultra vires*, then it must follow that the defendant did not acquire any equity under its own unlawful contract in violation of the rights of innocent third parties. "One who deals with the officers and agents of a corporation is bound to know their power and the extent of their authority." Corporations and stockholders have certain rights, fundamental in their nature, guaranteed to them by the constitution and laws of the state, which all must take notice of and eliminates the necessity of any offer to do equity in case of their infringement. The proposition is tersely stated in the case of *Franklin v. Hevelena Mining Co.*, 141 Pac. 727, as follows:

"To require the plaintiff to tender defendant the expenditures, before permitting him to prosecute his suit would be the height of inequity, as it would endorse the proposition of

forcing the owner of property to repay the trespasser moneys expended by him on the property as a condition precedent to the right of recovery.”

On this question see also *Citizens Saving & Trust Co. v. Illinois Cent. R. Co.*, 182 Fed. 607-613.

The defendant bank has made no defense of money paid, under the terms of the contract and deed. If such defense had been made, appellants would still contend, using the language of the Supreme Court of the United States in the case of *M. & M. R. R. Co. v. Soutter*, 13 Wall 517, 20 Law Ed. 543,

“A fraudulent purchaser of property, when deprived of its possession, cannot recover for repairs or improvements nor for incumbrances paid while in possession. * * * He that hath committed iniquity shall not have equity.”

And on the further ground, that while the contract is fraudulent it is also *ultra vires*. Citing from *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 59,

“A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, be-

cause it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

It is further stated in said opinion on page 61,

"Whether this plaintiff could maintain any action against this defendant, in the nature of *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued."

ASSIGNMENT OF ERROR NUMBERED 13.

The thirteenth (13) Assignment of Error is based upon the decree absolutely dismissing plaintiff's and intervenor's complaints in this action. The facts disclosed by the pleadings admitted and proven in this cause, seem conclusive as to the right of the plaintiff to institute this action, so that appellants will simply direct this Court's attention on this point to the authorities cited under the head of "Theory of Cause," while on the other questions, properly debatable under this assignment, appellants have the following observations to make, based on the law and authorities heretofore cited, and which appellants deem controlling and conclusive in the premises.

A board of trustees cannot convey all of the assets of the corporation without the consent of all of the stockholders even where a valid consideration is given therefor. The transfer under discussion

was made without any official action on the part of the board of trustees. This was, in effect, a dissolution of the corporation, contrary to the law of the state governing such dissolutions. When a stockholder buys stock in a corporation he is assured by the law that the corporation will not be dissolved except in the manner provided by statute. Public policy as well as common fairness demands this. Any other rule would violate the law and would leave minority (sometimes a majority) stockholders at the mercy of a corrupt, indifferent or inefficient president and secretary. The facts of any particular cause do not effect this protecting rule unless, possibly, the invalid act is approved by *all* of the stockholders, and even then the rule is not effected but the remedy is lost because the stockholders would be estopped to repudiate the action of the trustees.

A further objection and one emphasizing the foregoing is that part of the alleged consideration for giving the deed was that the Schades were to use the property without rent for a period of eighteen months and they were to be released from their *personal* obligations as makers of the notes described in the mortgage. We confidently insist that such a gross disregard of their duties as trustees for the stockholders cannot be, and is not, upheld by any law or rule known to our jurisprudence, and that is equally true where no moral turpitude is involved or even where the final net result might be of bene-

fit to the corporation. For what the law jealously seeks to prevent is the possibility of fraud or the temptation to perpetrate fraud or the securing of personal advantage on the part of those who occupy this fiduciary relation to the stockholders. The validity of their act is not governed by the *possible* result or even by the *probable* result. The limitations on the powers of the trustees are as definitely fixed as those of an administrator, and the court well knows that such a proceeding as is attempted here would not be sustained if brought about by an administrator.

It is contended that by giving this deed the Brewing Company had six months more time in which to redeem the property than it would have had if the foreclosure suit had gone to a decree. We know of no authority upholding that defense even if the fact was demonstrated. No such fact may be assumed. The decree referred to might have been in defendant's favor. It will be noticed that one of the defenses in the foreclosure suit, made under oath by the defendant Schade was that he was mentally incompetent to execute the notes sued upon. (See, Trans. p. 150-1) Why can it be assumed as against this plaintiff stockholder that the plaintiff in the foreclosure suit would get any decree at all in that case? If the law says that Schade was legally incompetent to make the deed conveying away all of the corporate property—and Schade himself swears that he was mentally incompetent to make the notes and on that ground defended the foreclosure suit—

what right have we to assume that the corporation received even the benefit of six months extra time for redemption? May we not quite as well assume that the complaint would have been dismissed?

Plaintiffs and intervenor bought this stock under the guarantee of the statute that they would not be deprived of their interest in the corporation except in the manner provided by law. That and only that was their security. They never supposed and had no reason to suppose that a mortgage was placed on the property and suit was started to foreclose same that they would be deprived of the right to have it sold at public auction under the statute if a decree was secured by the mortgagee.

What the plaintiff and intervenor have lost by this transaction is:

1. The right to have the property disposed of by the trustees duly authorized and acting as required by law.
2. A valid consideration without any special privilege being given to the Schades in the way of free rent or release from their obligations.
3. The right to a full and complete defense in the mortgage foreclosure suit which Schade swears then existed.
4. The right to have the property—if foreclosure was granted—sold at public auction as provided by law.

5. The right if the corporation was dissolved—as it has been by the sale of its entire assets—to have it done as provided by law with the right to appear and object.

What the bank got through this transaction was:

1. Relief from a perfect defense according to the oath of President Schade.

2. The entire assets of the corporation for about \$63,000.00, though it is not denied that their value is many times that amount.

What the Schades, Trustees, got was:

1. Relief from their obligations as signers of the notes.

2. The option to use the property free of rent for eighteen months.

What the plaintiff and intervenor stockholders got after sustaining the losses above enumerated was—nothing.

We submit that this proceeding cannot receive the sanction of a court of equity.

As to plaintiff and intervenor doing equity—they cannot be required to do equity for there is no equity to do. They have received nothing to which the bank is entitled. They have not received any benefit by the transaction. They have lost by it thus far. The Court should not place itself in the position of guardianship of the bank, for it has

deliberately and with full notice placed itself in its present position. The law charges it with full knowledge of the illegality of its acts. It also had actual notice, and it was surrounded by and was acting under the advise of its staff of capable attorneys. It cannot be that a person dealing with a corporation can deliberately plunge along and invalid course and then demand equity when halted? If, however, appellants are mistaken, and the rule is that one cannot really fail in an attempt to perpetrate a fraud—constructive or actual—and that though he may not get all that he went after he cannot lose anything in the attempt, then, the bank has pursued a proper course.

This plaintiff and intervenor cannot tender the amount of the alleged indebtedness of the Brewing Company to the bank, and to say that they must do so, is to measure their rights as stockholders, trying to undo the illegal acts of the defendants, by the amount of money they may possess. They are asked to pay the piper though they did not dance and were not invited to do so. This question resolves itself into this: Can an illegal transaction like this be put through if the minority dissenting stockholders cannot raise the money to make one of the offending parties whole? It is inconceivable.

Respectfully submitted,

CALEB JONES AND POST, RUSSELL
& HIGGINS. Solicitors for Appellants.

Service of the foregoing brief by the receipt of a copy thereof is hereby acknowledged this ——— day of August, 1921.

Solicitors for Appellee, Spokane & Eastern
Trust Company.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ERNA KORN and MUTUAL SECURI-
TIES COMPANY,

Appellants,

vs.

SPOKANE & EASTERN TRUST COM-
PANY,

Appellee.

No. 3693

B. SCHADE BREWING COMPANY,

B. SCHADE and L. R. STRITESKY,

Defendants.

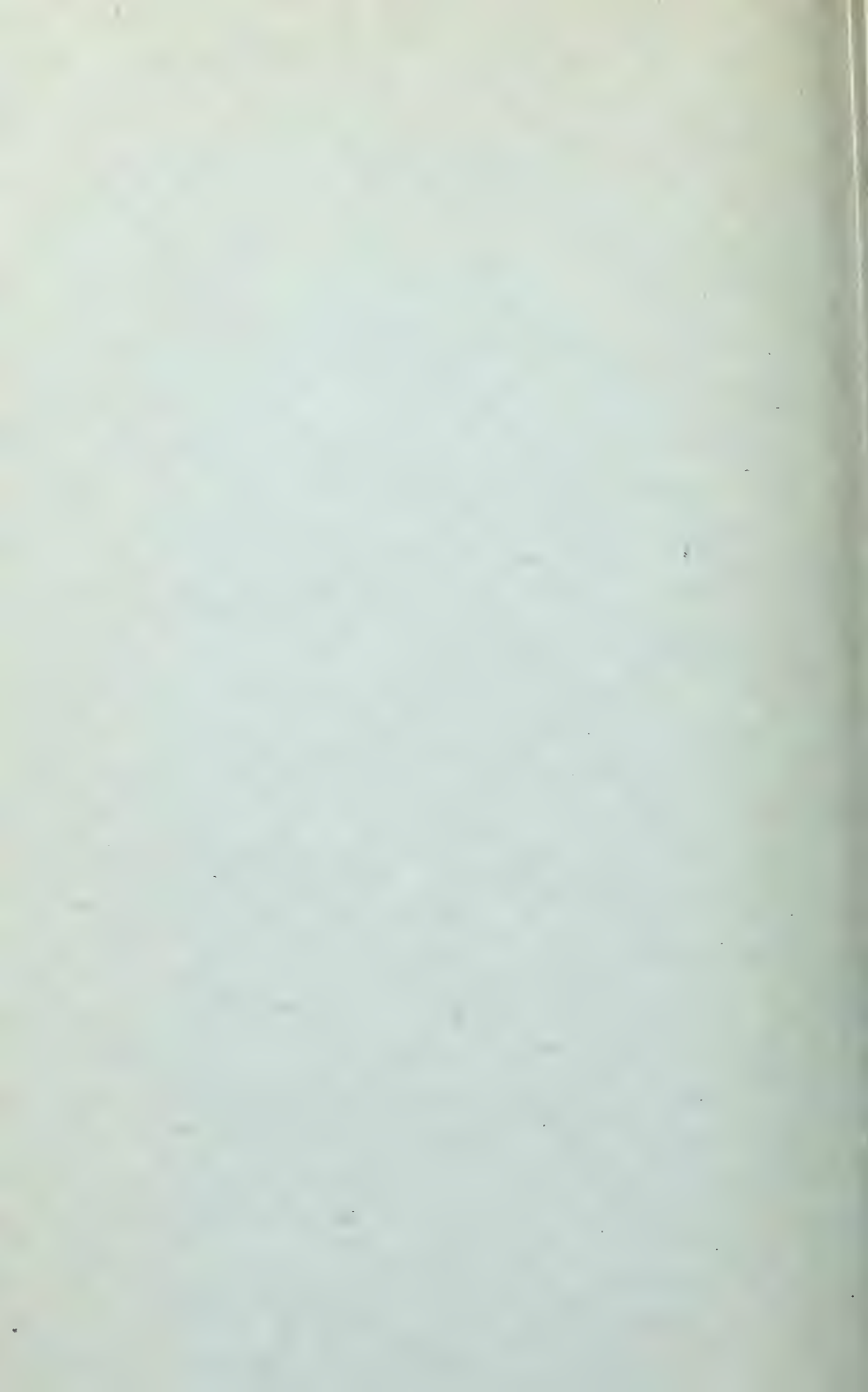
*Appeal from the District Court for the Eastern
District of Washington*

APPELLEE'S BRIEF

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,

Spokane, Washington

Solicitors for Appellee.



IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ERNA KORN and MUTUAL SECURI-
TIES COMPANY,

Appellants,

vs.

SPOKANE & EASTERN TRUST COM-
PANY,

Appellee.

No. 3693

B. SCHADE BREWING COMPANY,
B. SCHADE and L. R. STRITESKY,
Defendants.

*Appeal from the District Court for the Eastern
District of Washington*

APPELLEE'S BRIEF

F. H. GRAVES,
W. G. GRAVES,
B. H. KIZER,

Spokane, Washington

Solicitors for Appellee.

STATEMENT OF THE CASE.

The statement made in the appellants' brief is very far from being the concise abstract of the salient facts of the case which the rules contemplate, so we shall endeavor to supply the lack.

This is a shareholder's suit, brought by the appellant Korn, a shareholder in the B. Schade Brewing Company, against the Spokane & Eastern Trust Company, a banking house of Spokane, the B. Schade Brewing Company, and B. Schade and L. R. Stritesky, officers of the Brewing Company, for the purpose of setting aside a conveyance of the property of the Brewing Company to the Trust Company and recovering possession of the property from the Trust Company; the theory of the bill of complaint being that the conveyance was *ultra vires*, and was not properly authorized. Another shareholder, the Mutual Securities Company, praying the same relief as the original plaintiff, was permitted to intervene. A trial upon the merits was had, and the bill was dismissed as devoid of equity. The plaintiff and the intervenor prosecute this appeal.

The B. Schade Brewing Company is a Washington corporation, incorporated in 1903. In the original articles of incorporation, the objects for which it was organized were stated to be the manufacture and

sale of beer and the acquisition of property for the purposes of such business (Tr., 4). In 1907 the corporate objects were enlarged by an amendment of the articles of incorporation, in addition to other powers it taking the power "to purchase, acquire, * * * lease, mortgage, sell and convey breweries, malt houses, bottling works and ice and fuel manufacturing plants and machinery; to purchase, lease, own, operate, mortgage, sell and convey real and personal property for any purpose which the corporation may deem expedient or necessary to aid in, increase, or protect any business it may now or hereafter become engaged in." (Tr., 81.) It constructed a brewery in Spokane, and there engaged in the business of making and selling beer, and in no other business, until the Washington prohibition act became effective on 1st January, 1916. It then made a futile attempt to operate a soft drink establishment, but the business did not pay and was conducted for but a very short time. It then ceased all business (Tr., 63, 64).

During the period here involved, the Brewing Company had an issued capital stock of 5,000 shares. B. Schade owned 2,606 shares, Sophia Schade, his wife, 50 shares, and L. R. Stritesky, 91 shares. The other shareholdings were scattered, officers in the Spokane & Eastern Trust Company, and persons to whom they had recommended the stock, owning several hundred shares (Tr., 57, 62, 93). The board of directors consisted of Mr. and Mrs. Schade and

Stritesky. During the prosperous years of the business, before the prohibition shadow fell upon it, shareholders quite generally attended the corporate meetings. When the business ceased to pay, the shareholders lost interest and no longer attended the meetings, so that, as Stritesky testified, "for a number of years before the transaction ended the stockholders' meeting consisted of the Schades and myself," and the three were left to run the corporation as they pleased (Tr., 61-63).

Prior to 1914 the Brewing Company had become indebted to the Spokane & Eastern Trust Company in the sum of \$50,000, for money loaned to and used by the Brewing Company in its business. In 1914 this indebtedness was evidenced by promissory notes executed by the Brewing Company and secured by a mortgage upon all its property. The notes were guarantied by Schade, but the debt was a corporate debt and Schade's guaranty was purely an accommodation guaranty, made because of his relation to the corporation. When prohibition became effective in Washington, and the business of the Brewing Company was destroyed, it was left without a dollar, and has no resources from which to pay interest on its indebtedness or taxes or insurance on its property (Tr., 63-64). Its affairs being hopeless, the Trust Company assigned the notes and mortgage to the State Finance Company, a subsidiary corporation of the Trust Company, for purposes of suit, and the Finance Company brought a foreclosure suit,

joining B. Schade as defendant, to recover upon his guaranty of the debt, and making Mrs. Schade a defendant for the purpose of having Schade's guaranty adjudged to be a community debt (Tr., 91-92, 124-133). The Schades answered separately, as did the Brewing Company. The case was set for trial, when a compromise and dismissal of the suit was effected upon these terms: The Brewing Company caused the mortgaged property to be conveyed to the Trust Company, and the latter caused the foreclosure suit to be dismissed with prejudice, and surrendered the notes and released the mortgage. It was agreed that the Brewing Company was indebted to the Trust Company in the sum of \$63,650; \$50,000 principal, and the remainder delinquent interest, and taxes and insurance on the property paid by the Trust Company. The Trust Company gave the Brewing Company an eighteen months option to repurchase the property for the amount of the indebtedness, the parties agreeing to cooperate in the endeavor to find a purchaser for the property during the option period (Tr., 13-19). The Brewing Company continued in possession of the premises during the option period, and seemingly made considerable effort to find a purchaser for the property, as a whole or in parcels. At the monthly meetings of the directors of the Brewing Company during that period, Schade reported the efforts being made to sell the property and the prospects for making a sale (Tr., 59-61). No sale could be made, however, and at the expiration

of the option period, 1st July, 1919, the Trust Company took possession of the property (Tr., 63-64). On 25th August, 1919, the Trust Company made an offer to all the shareholders of the Brewing Company to give them an interest in the property, proportionate to their shareholdings in the Brewing Company, if they would pay a proportionate share of the Brewing Company's indebtedness to the Trust Company; in other words, the Trust Company offered to convey the property of the Brewing Company to its shareholders if they would pay the incumbrance on it, or if all the shareholders would not come in, to give to any shareholder a part interest in the property who would pay a proportionate part of the incumbrance (Tr., 92-94, 165-169). Seven or eight of the shareholders accepted the offer (Tr., 94). Plaintiff, who is a niece of B. Schade and bought her stock from him (Tr., 80), was not one of these, being under the impression, as the waging of this suit evidences, that a court of equity would give the property back to the shareholders freed from the incumbrance upon it, leaving the debtor to hold the sack. The particular court to which she appealed, however, considered her complaint to be "entirely devoid of equity," and so dismissed her suit (Tr., 43-47).

ARGUMENT.

Counsel have presented appellants' case by attacks upon segregated parts of the chain of reasoning by which Judge Rudkin reached the conclusion that the suit was devoid of equity. It will be more conducive to clarity, we think, to segregate and discuss the ultimate points which may be made against and in support of that conclusion, and we shall pursue that course in presenting the appellee's case.

The points which appellants make for reversal are these: (a) That the conveyance of all the property of the Brewing Company to the Trust Company was *ultra vires* the Brewing Company; (b) That the conveyance was not authorized by the board of directors of the Brewing Company; (c) That the conveyance was fraudulent, in that the officers of the Brewing Company personally profited by the transaction. After discussing those points we shall urge upon the Court that, albeit those points were well taken, nevertheless the suit is not maintainable because appellants do not offer to do equity, but on the contrary are asking the aid of a court of equity to do inequity.

We premise our discussion of the questions involved by suggesting that they are to be decided by reference to the local law of Washington. The Brewing Company is a Washington corporation, and in determining whether, in making the conveyance

assailed, it acted in conformity to or defiance of the Washington statutes governing the action of Washington corporations, the decisions of the Washington courts will control the Federal courts. *Smith v. Kernochan*, 7 How. 198; *Williams v. Gaylord*, 186 U. S. 157; *Equitable L. Assur. Soc. v. Brown*, 213 U. S. 25; *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467. Furthermore, the transaction is of a purely local character, occurring wholly in Washington and between citizens of that State, and in such case the Federal courts will adopt the rule of the State courts upon questions of law which are of a general nature; *e. g.*, as to what is essential to the maintenance of an action for rescission. *Sim v. Edenborn*, 242 U. S. 131. This Court has always adhered to the rule that there ought to be but one rule of law within the State, administered in the Federal as well as the State courts, and that upon matters of general law it would follow the rule adopted by the State courts, unless coerced by controlling decisions to adopt a different rule. *American Surety Co. v. Bellingham Nat. Bank*, 254 Fed. 54.

We do not make the suggestion in anticipation of a conflict between Federal and State decisions upon the questions involved, for we find no conflict, but entire concordance. It is made in explanation of the fact that we have not looked beyond the Washington and Federal reports for authority to sustain our positions.

I.

(a) *Ultra Vires.*

The powers of the Brewing Company, as stated in its original articles of incorporation, were limited, being confined to the manufacture and sale of beer, and the acquisition of such real and personal property as was necessary for the carrying on of such business (Tr., 4-5). In 1907 the articles were amended so as to increase the corporate powers. While the manufacture and sale of beer remained the chief purpose of the corporate existence, power was conferred upon the corporation to "purchase, acquire, * * * mortgage, sell and convey breweries, malt houses, bottling works," etc., and to "purchase, * * * mortgage, sell and convey real and personal property for any purpose which the corporation may deem expedient," etc. (Tr., 81). Under the amended articles there can be no doubt of the power of the Brewing Company to sell all its property. In *Pitcher v. Lone Pine Surprise Co.*, 39 Wash. 608, the sale by a mining company of all its mines was attacked by a dissenting shareholder upon the ground, *inter alia*, that it was *ultra vires* the company. The purposes for which the company was formed, as stated in its articles of incorporation, were to "work, operate, buy, sell, * * * hold and deal in mines." Referring to these powers, the Court said: "The trustees, therefore, had the power to sell these mines." The question was more concretely presented in *Lange v. Reser-*

vation Min. Co., 48 Wash. 167. There a shareholder brought suit to enjoin a mining company from selling its property, claiming that "neither the trustees, nor a majority of the stockholders of a corporation, have power, against the objection of minority stockholders, to sell or otherwise dispose of the entire property of the corporation," unless such sale was necessary to pay debts, prevent losses in a losing business, etc. The corporation was given power, by its articles of incorporation, to "buy, sell, * * * and deal in mines." Admitting the soundness, in an appropriate case, of the rule contended for by the plaintiff, but denying its applicability to the instant case, the Court said:

"It is a question of power in the board of trustees. And this power exists, we think, both by virtue of the articles of incorporation, and the general law conferring the management and control of the corporate business on the board of trustees. *Pitcher v. Lone Pine-Surprise Consol. Min. Co.*, 39 Wash. 608, 81 Pac. 1047."

The final word of the Washington Supreme Court upon this subject is found in *Logie v. Mother Lode Mines Co.*, 106 Wash. 208, 216. There it was said:

"Under the power granted by Rem. Code, §3683, especially subdivisions 3 and 7 thereof, a corporation, whose objects and purposes are declared by its articles of incorporation to be, among other things, to purchase and acquire real and personal property and sell and alienate the same, in whole or in part, freely and to the same extent as any person, actual or artificial, having similar dominion over property may lawfully do, obvi-

ously has the power to lawfully dispose of substantially all, or in fact all, of its property. That is one of its objects. The power to sell all or part of its property is coextensive with the power to acquire by purchase or otherwise. This court has repeatedly held that, where the right and purpose to sell is among the objects expressed by its articles, a corporation may sell—that is, has the power to sell—all of its property, notwithstanding the dissent of minority stockholders.”

This Court, upon substantially similar facts to those appearing in the above cited cases, has reached the same conclusion as the Supreme Court of Washington. *Geddes v. Anaconda Min. Co.*, 245 Fed. 225. And such, unquestionably, is the universal rule. 14a Corpus Juris, 541, §2416.

It is feebly contended that the Brewing Company could not amend its articles of incorporation without the unanimous consent of its shareholders. If that were admitted the appellants' cause would not be advanced. When the amended articles were offered in evidence it was not objected that the amendment had not been duly authorized, and it does not appear but that the amendment was assented to by all the stockholders (Tr., 81). Obviously this Court will not presume that the amendment was not properly adopted, in order that it may thereby impute error.

But the contention is so utterly unsound as matter of law that it is surprising it is made. The sections of Remington & Ballinger's Code to which counsel refer have not the slightest relevancy to the subject of amendment of articles of incorporation. The con-

stitution of Washington, in effect, of course, when the Brewing Company was incorporated, provides that:

"Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended, or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law."

Article XII, §1, Remington's 1915 Code.

The section of the statute which provides for articles of incorporation, their contents and amendment, provides that:

"Amendments may be made to the articles of incorporation by a majority vote of its trustees and the vote or written assent of two-thirds of the capital stock of such corporation. * * * The president and secretary of said corporation shall certify said amendments in triplicate under the seal of said corporation to be correct and file and keep the same as in the case of original articles and from the time of filing said amendments such corporation shall have the same powers and it and the stockholders thereof shall be subject to the same liabilities as if such amendments had been embraced in the original articles of incorporation."

Remington & Ballinger's Code, §3679, Remington's 1915 Code, §3679.

In the face of these constitutional and statutory provisions we are surprised that counsel should even suggest that the articles of incorporation of a Washington corporation cannot be amended without the

unanimous consent of its shareholders. True, authorities may be found holding that under a reserved power of amendment "no complete and radical change, creating, in substance, a new corporation, could be made against the opposition of any shareholder." 1 Machen, Corporations, §147. But here no radical change was made. The primary, indeed, the sole business, of the Brewing Company remained the manufacture and sale of beer, and the only effect of the amendment was to enlarge its powers in respect of the acquisition and disposal of property used in connection with that business. Manifestly such an amendment was permissible under the constitutional and statutory provisions of Washington. 1 Machen, Corporations, §147; 2 Cook, Corporations (6th ed.), pp. 1322-1325. This Court has held that under provisions like those of the Washington constitution, it is permissible for the State to authorize corporations previously formed to dispose of all their property. *Geddes v. Anaconda etc Co.*, 245 Fed. 225. And such is the universal rule. *Allen v. Ajax Min. Co.*, (Mont.), 77 Pac. 47.

Moreover, this amendment was made in 1907. For thirteen years the amendment appeared upon the corporate records and the public records of the State (amendments to articles of incorporation are required to be kept as a part of the corporate records and filed in the office of the Secretary of State and of the County Auditor of the county where the corporate place of business is located, Remington's 1915 Code,

§3679), as the organic law of the company. During that time no shareholder of the Brewing Company took any step to nullify the amendment or made any objection to it. It must be presumed that the Trust Company dealt with the Brewing Company in reliance upon the amendment. It is clear that shareholders will not now be heard to say, in order to destroy the rights of a corporate creditor, that the amendment was not properly authorized. 2 Cook, Corporations (6th ed.), §503; 1 Machen, Corporations, §157.

However, the conveyance is unimpeachable although the amendment of the articles of incorporation be disregarded, and the Brewing Company be considered to possess no powers except those stated in the original articles. It was organized for and engaged in the transaction of business. It had, of course, power to contract indebtedness for the prosecution of its business. Under the Washington statute it also had power, regardless of any expression in its articles of incorporation, to "purchase, hold, mortgage, sell and convey real and personal property." Remington & Ballinger's Code, §3683. Remington's 1915 Code, §3683. This statutory provision was considered by the Washington Supreme Court in *Klosterman v. Mason County Ry.*, 8 Wash. 281. A railroad company borrowed money for the purposes of its corporate business, and mortgaged its property to secure the indebtedness. Being unable to pay the debt it conveyed the mortgaged property, which was all the property it owned, in satisfaction of the mort-

gage. Unsecured creditors of the corporation attacked the conveyance, claiming it to be in contravention of the constitution of Washington and of the trust fund theory of corporate property which is a dominant feature of the corporate law of Washington. The Supreme Court sustained the conveyance. Referring to the statutory language above quoted, it said:

"From this comprehensive provision it will be seen that the appellant corporation had a right, in the proper conduct of its business, to mortgage its property to secure its debts. And this being so, it had a right to sell, in good faith, any or all of its property in payment of its mortgage liens. 2 Rorer, Railroads, p. 880; and see Railroad Co. v. Howard, 7 Wall. 392; Warfield v. Marshall County Canning Co., 72 Iowa 666 (34 N. W. 467). In the absence of legislative restrictions, or some limitation arising from its nature, a corporation may dispose of any property it has a right to acquire, in the same manner as an individual. Pierce, Railroads, 503. By legislative permission it may even dispose of its franchise. See Willamette Mfg. Co. v. Bank of British Columbia, 119 U. S. 191 (7 Sup. Ct. 187).

* * *

The learned counsel for the respondent and the intervenors insist that, by virtue of the above cited provision of the constitution, the property in question is still subject to the claim of the respondent. But we are not of that opinion. That provision declares, in effect, that, if a corporation shall lease or alienate its franchise, neither the franchise nor the property held thereunder shall thereby be relieved from liabilities contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges. This is but a declaration of what the

courts have generally held to be the law, irrespective of constitutional limitations or provisions. *Chicago etc. Ry Co. v. Chicago Third Nat. Bank*, 134 U. S. 376 (10 Sup. Ct. 550). But we do not think that there is anything in the law or this provision of the constitution which inhibits a corporation from voluntarily transferring property for the payment of debts for which the property so transferred is legally bound."

The case at bar is ruled by the cited case. The indebtedness of the Brewing Company to the Trust Company was a just debt, arising from a loan of money for the purposes of the corporate business. No question is made concerning the validity of the mortgage given to secure the debt. The sole claim is that it was beyond the power of the Brewing Company to convey the mortgaged property in satisfaction of the debt. Precisely that contention was made in the *Klosterman Case*, and the decision here must follow the decision there.

But disregard, if you please, the antecedent mortgage. The Brewing Company was in such a financial condition when the conveyance was made as to preclude any shareholder from denying its power to convey its property in payment of its debts. And this, mark you, without consideration of the provisions of its articles of incorporation, and without regard to whether the creditor to whom the conveyance was made had or had not a lien upon the property conveyed.

It has never been questioned in any court that a

private business corporation may, without the consent of its shareholders, sell all its property for the purpose of paying its debts, especially when it is in an embarrassed condition. •

“There can be no doubt that a corporation has the power to convey or transfer any part or all of its property when necessary to pay debts lawfully contracted by it. And for this purpose it has the same power as a natural person to make an assignment in trust for the benefit of its creditors, provided there is no charter or statutory restriction in the way.”

2 Fletcher, *Cyclopedia Corporations*, §1191.

“A purely private business corporation, like a manufacturing or trading company, which is not given the right of eminent domain, and which owes no special duties to the public, may certainly sell and convey absolutely the whole of its property, when the exigencies of its business require it to do so, or when the circumstances are such that it can no longer profitably continue its business, without regard to whether minority stockholders consent or object, provided the transaction is not in fraud of the rights of creditors, or in violation of charter or statutory restrictions.”

Ibid, §1207.

“At common law neither the directors nor a majority of the stockholders has power to sell all the property of a going, prosperous corporation, able to achieve the objects of its creation, as against the dissent of a single stockholder. Where, however, the corporation is insolvent or in failing circumstances, and the business can no longer be carried on profitably and advantageously, such a sale may be made, and minority stockholders cannot object thereto in the absence of fraud.”

14 *Corpus Juris*, 866.

In *Geddes v. Anaconda Min. Co.*, 245 Fed. 225, 233, this Court quoted approvingly from Judge Thompson the following rules governing the right of a corporation to dispose of all its property:

“Where the corporation is in failing circumstances, or is in fact insolvent, the directors and managing officers may dispose of all the property, or make an assignment of all the corporate property for the benefit of creditors. * * *

The majority stockholders, even as against the protest of the minority, may dispose of all the property when the corporate business has become unprofitable, and where it would be ruinous to the corporation and the stockholders to continue the business, or where there are insufficient funds to continue the business and no money with which to pay existing indebtedness, or when the corporation is in failing circumstances, or is in fact insolvent.”

While the Supreme Court of the State has never had occasion to rest the power of a private corporation to sell all its property solely upon its insolvent or embarrassed condition, yet in *Lange v. Reservation Min. Co.*, 48 Wash. 167, 168, it was assumed to be settled law that a corporation had power, over the objection of minority shareholders, to sell all its property for such causes “as the payment of legitimate debts, the prevention of further losses from a losing business, or such like causes.” There can be no doubt of its agreement with the settled rules heretofore stated.

Now the condition of the Brewing Company when the conveyance was made, in 1918, was deplorable;

hopeless in fact. It had no other business but the manufacture and sale of beer. Its entire capital was invested in that business. It had no property but a brewery situated in Washington. That State became emphatically "dry" on 1st January, 1916. The neighboring States of Idaho and Oregon were in the same condition. In 1917 Congress had adopted a joint resolution proposing the Eighteenth Amendment, and no one doubted that it would be adopted. For a short time after Washington went dry the Brewing Company ran a soft drink establishment on a very small scale, but the business never paid and was soon abandoned. From thence on it did no business, had no income, could not pay its taxes, and had not "a dollar's worth of money" (Tr., 63-64). The principal of its debt to the Trust Company was overdue, interest on the debt was unpaid, and it had defaulted in the payment of taxes and insurance on the property, which it had agreed in the mortgage to keep up. In January, 1918, when the conveyance was made, the interest on the debt amounted to \$6,000, delinquent taxes, on account of which tax certificates had been issued, amounted to over \$5,600, and unpaid premiums for insurance amounted to over \$700 (Tr., 16.) The conveyance was made, says Stritesky, because the company "Couldn't pay the mortgage and there wasn't anything else to do" (Tr., 64). For long before that time it had been recognized by the Brewing Company and Mr. Geraghty, its then counsel, that it could not pay the debt, and that its sole hope was to stave off fore-

closure as long as possible; the plan of avoiding foreclosure by conveying the property with a stipulation for buying it back after a time having long been in mind (Tr., 96-98). Mr. Schade was too ill to appear in court (Tr., 80), but the reports which he made to the board of directors at its monthly meetings during the period from the time of the conveyance to the expiration of the option to repurchase period, show that the officers of the company had no hope of saving anything from the wreckage unless the property could be sold piecemeal (Tr., 59-61). That the business of the Brewing Company was totally destroyed by the prohibition wave which has swept the country, and that it was hopelessly insolvent, had no hope for paying its indebtedness, and would have lost its property by tax foreclosure or possible destruction by fire, uninsured, but for the intervention of the Trust Company, are facts so patent that it would be presumptuous to dilate upon them. And that such conditions relieve the conveyance from the imputation of *ultra vires* which might otherwise be cast upon it is too clear to require more than suggestion.

Finally, under the settled law governing the transactions of Washington corporations, the Brewing Company is estopped to say the conveyance was *ultra vires*. From the time of *Tootle v. Bank*, 6 Wash. 181, to *Flanagan v. American Min. Co.*, 108 Wash. 569, it has been the settled doctrine of the Supreme Court of Washington that a corporation which has enjoyed the benefit of its *ultra vires* act could not repudiate

it. Nor is the doctrine of estoppel limited to cases where the corporation has received benefit from the *ultra vires* act. It is equally invocable where it does not appear that direct benefit has accrued to the corporation, but it does appear that for its own purposes the corporation did the act, and that in reliance upon its action the other party has acted to his injury. In such case the corporation may not repudiate its action merely on the ground that it exceeded its charter powers. It will only be permitted to do so "where the transaction is prohibited, illegal, or immoral." *United States F. & G. Co. v. Cascade Const. Co.*, 106 Wash. 478. To the same effect are *Creditors Claim etc. Co. v. Northwest L. & T. Co.*, 81 Wash. 247, and *Moore v. American Sav. Bank*, 111 Wash. 148. Those decisions are controlling here, being a part of the local law governing the transactions of Washington corporations. *Eastern Bldg. & Loan Ass'n v. Ebaugh*, 185 U. S. 114; *Lindauer v. Compania Polonias*, 247 Fed. 428. They are, furthermore, thoroughly in harmony with the decisions of this Court. *United States Sav. & L. Assn. v. Convent of St. Rose*, 133 Fed. 354; *Kellogg-Mackay Co. v. Havre Hotel Co.*, 119 Fed. 727.

The Brewing Company has received benefits from the conveyance in that in reliance upon it the Trust Company took up an outstanding tax certificate against its property of \$5,550, since it was made has paid about \$8,000 for taxes and insurance on the property, and has surrendered the notes and released the mortgage

(Tr., 92-96). The Trust Company has been injured by the dismissal of the foreclosure suit, the release of its notes and security, and the cost of keeping up an unproductive property. Its expenditures have run into thousands of dollars, and it has received not one cent of income from the property (Tr., 92). Clearly here is ample ground for estoppel against the Brewing Company, and equally clearly the estoppel runs against the shareholders as it would against the corporation. They sue in its right; what concludes it concludes them; if for any cause it could not maintain the suit they cannot. 6 Fletcher, Cyclopaedia Corporations, §4061; Machen, Corporations, §1183; 14 Corpus Juris, 929, §1446. As said by the Court of Appeals of New York:

“A plaintiff who asserts a derivative cause of action must establish the existence of a cause of action in the party whose rights are sought to be enforced. A cause of action cannot be derived from a source in which it does not exist.”

Waters v. Horace Waters Co., 94 N. E. 602.

Turning to the appellants' positions and authorities, it will be observed that the point upon which they most insist is that by the conveyance of all its property the Brewing Company was disabled from transacting the business for which it was organized; that it therefore amounted to a dissolution of the corporation; and that as the Washington statute has provided a method by which corporations may be dissolved, the adoption of any other method is *ultra vires*.

If it were conceded that the conveyance did, in effect, dissolve the corporation, it would by no means follow that it was therefore illegal. There is necessarily embraced in the powers of every corporation organized for the transaction of business for profit, the power to incur debts in the prosecution of such business, and the power to use its corporate property for the payment of such debts. Indeed, under the law of Washington it is obligatory upon such a corporation to use its property to pay its debts, for its property is a trust fund for the benefit of its creditors. *Thompson v. Lbr. Co.*, 4 Wash. 600; *Conover v. Hull*, 10 Wash. 673; *Compton v. Schwabacher*, 15 Wash. 306. So it may make a common law assignment for the benefit of its creditors, and a shareholder may not complain, since it is "the settled rule * * * that the assets of a corporation constitute a trust fund for the payment of all its creditors, and every stockholder is conclusively charged with notice of the trust character which it attaches to the capital stock." *McKay v. Elwood*, 12 Wash. 579, 584. Therefore a Washington corporation, while solvent, may mortgage all its property to secure the payment of its debts, and no valid objection can be made to the mortgage because through its operation the corporation was stripped of all its property and prevented from prosecuting the business for which it was organized. *Klosterman v. Mason County Ry*, 8 Wash. 281. It is evident, therefore, that the Brewing Company had power to mortgage all its property to secure the

payment of its debt to the Trust Company. As neither the Brewing Company nor its shareholders could have defended a foreclosure of the mortgage on the ground that a decree of foreclosure and sale would amount to a dissolution of the corporation, on what theory can its shareholders be permitted to set aside a conveyance of the mortgaged property, made in satisfaction of the mortgage debt, because it would amount to a dissolution? The answer is found in the *Klosterman Case*: There is no such theory. The Supreme Court there said of the corporate defendant: "It had a right to sell, in good faith, any or all of its property in payment of its mortgage liens." It is clear, therefore, that it cannot be validly objected to the conveyance by a Washington corporation of all its property in satisfaction of its debts, that it was thereby disabled from the further transaction of business, and was, in effect, thereby dissolved.

Moreover, if in any case the conveyance by a corporation of all its property in payment of its debts could be objected to by a shareholder on the ground that the corporation was thereby disabled from pursuing its corporate objects, that objection cannot be made here. It was the wave of prohibition legislation sweeping the United States, more particularly the Washington prohibitory law, which disabled the Brewing Company from further pursuit of its business. It had no property but a brewing plant. It endeavored to put that plant to the only lawful use to which it could be put, the manufacture of soft

drinks, but the business was unprofitable and it was forced to abandon it. Counsel suggests that it could have renewed its brewing business in one of the other states in which it was authorized to do business. Idaho and Oregon were already dry. The Eighteenth Amendment had been submitted by Congress, and there was no reasonable doubt that it would be approved in a sufficient number of states to secure its adoption. Even if it would have been other than idiocy for the Brewing Company to think of engaging in the brewing business in any other state under such conditions, it had not the means to do so. To acquire realty, construct appropriate buildings, and move its brewing machinery to a location in another state, would have required an expenditure of thousands of dollars, and it had not a cent. Moreover, the mortgage it had given, and the lien which, under the trust fund theory of the Washington law, corporate creditors have upon corporate property, would have prevented its migration with any of its property, save with the consent of the Trust Company. Plainly, then, it was the law, not the conveyance of its corporate property, that disabled the Brewing Company from pursuing its corporate business. We suppose it will not be contended that the enactment of the prohibitory law dissolved the Brewing Company, and if it could not have that effect, the conveyance of the corporate property, which was necessitated by the conditions which the law created, could have no such effect.

However, the notion that the mere conveyance by a

corporation of all its property disabled it from performance of its corporate functions, and therefore amounted to its dissolution, is exploded in this jurisdiction. That notion was the basis for the plaintiff's contention in *Lange v. Reservation Min. Co.*, 48 Wash. 167. The Supreme Court held it fallacious, saying that "the corporation will be in as good a condition to proceed with the objects it was formed to promote, after this sale, as it was before." That case was followed in *Smith v. Flathead R. Coal Co.*, 66 Wash. 408, where it was held that a sale of all the defendant's property was not a dissolution of it. The same question was before this Court in *Geddes v. Anaconda Min. Co.*, 245 Fed. 225, and it held that a transfer of all its property did not dissolve a corporation; that property is not essential to corporate existence, and that there was nothing in a sale of all the corporate property which would prevent the corporation from proceeding with the corporate business and acquiring other property. The soundness of those decisions is seen when applied to the facts of the case at bar. The Brewing Company used its property to pay its debts. It was thus left propertyless and, in compensation, debtless. Manifestly the transaction by which it parted with its property and paid its debts did not, as matter of law, disable it from acquiring other property and continuing its corporate business. Its disability was caused by the prohibition legislation which was sweeping, and shortly swept, the country. That legislation rendered its business

unlawful, stripped it of all income and resources, and so impaired the value of its property that it could not sell the property in the market for sufficient to pay its debts. Nevertheless (adapting the language used in the Lange Case) the Brewing Company was "in as good condition to proceed with the objects it was formed to promote, after the 'conveyance, as it was before," for at neither time could it proceed. The law forbade it at one time as it did at the other.

Counsel lay great stress upon the cases of *Parsons v. Tacoma Smelting Co.*, 25 Wash. 492, and *Theis v. Spokane Gas Co.*, 34 Wash. 23. Those cases are not even remotely relevant. In the Parsons Case the corporation was engaged in a lawful business, was a going concern, and, while its business had not been very profitable, only a small part of its capital stock had been paid in, and if its officers had done their duty and compelled payment of the delinquent subscriptions, it would have had ample funds for the prosecution of its business. The purpose of the lease, the Supreme Court considered, was not to "keep the corporation a going concern, and enable it to perform the objects of its organization," but to relieve the delinquent shareholders from the necessity for paying for their stock, to obtain control of the stock, and to organize a new corporation which should include the elect and exclude the reprobate of the old corporation (pp. 500-501). While the Court held that these things could not be done over the objection

of minority shareholders, it observed, in distinguishing the cases upon which the corporation relied, that "an insolvent corporation may make an assignment for the benefit of its creditors against the will of a non-consenting stockholder, and probably any appropriate proceedings in equity might be taken to relieve a failing corporation by such disposition of its property as should be equitable" (p. 506).

The Theis Case involved a pure hold-up, thinly disguised under legal forms. The gas company, defendant there, was a highly prosperous concern. A syndicate of eastern bond buyers desired to get all its stock, and did buy all but Theis' eight shares. When he declined to sell they began disincorporation proceedings under the Washington statute, sold the property at public auction to a representative of the syndicate, and he immediately transferred it to a new corporation, formed by the syndicate, which continued, uninterrupted, the business of the former corporation. It was openly admitted that the disincorporation proceeding was a mere form, the sole purpose of which was to get rid of the single shareholder who would not sell his stock. Of course no court would permit that to be accomplished by mere mumming which the law forbids to be done straightforwardly. How the case can be supposed to be even remotely relevant to the questions here involved passes comprehension.

To dispose of the two cases as authority in the

case at bar, it needs but to be remarked that they were strongly urged upon the Supreme Court as authority for upsetting the sales involved in *Lange v. Reservation Min. Co.*, 48 Wash. 167; *Smith v. Flathead R. Coal Co.*, 66 Wash. 408; and *Logie v. Mother Lode Min. Co.*, 106 Wash. 208. In each of these cases they were put aside as utterly inapplicable.

We here wish to call attention to misquotations, inadvertent, we are confident, on pages 44 and 54 of the appellants' brief. In the report of the Theis Case, 34 Wash. 24, the points made and authorities cited by the respective counsel in that case are given. Among other points made by the plaintiff's counsel appears this: "The sale of its entire property is a dissolution without compliance with the statute." This language is changed to read: "The sale of the entire property of a corporation without compliance with the statute is a dissolution," and as so changed appears upon pages 44 and 54 of the appellants' brief in the case at bar, under the guise of a quotation from the opinion of the Court in the Theis Case. This was error. No such language, nor anything approaching it, was used, nor any such principle, nor anything approaching it, declared, in the Court's opinion. On the contrary, the sale there involved was set aside solely on the ground that while it was made under the guise of a statutory disincorporation and dissolution, the proceeding was a mere farce, no dissolution was intended or had, and the statutory form was resorted to as a disguise to the perpetration of a

fraud upon a shareholder who would not sell his shares.

Misleading, too, is the use made on page 44 of appellants' brief of the quotation from *Andrews v. National Foundry*, 76 Fed. 171. The quotation is from an opinion by the Circuit Court of Appeals for the Seventh Circuit, and relates to a decision by the Supreme Court of Wisconsin construing a Wisconsin lien statute. It is utterly foreign to the question under discussion, yet it is given the guise of an approval by a Federal court of the Theis Case as a decision controlling it, or rather, an approval of the contention of counsel in the Theis Case as though it were a decision of the Supreme Court of Washington which controlled it.

Bitter complaint is made that Judge Rudkin placed undue emphasis on the right of the Trust Company to have its debt paid from the property of the Brewing Company. It is insisted that the shareholders of the Brewing Company have a paramount right to demand that all its property shall not be taken for the satisfaction of its debts, save through the medium of the statutory disincorporation proceedings. And this holds good, it is said, although the corporation had ceased to be a going concern, with no possibility of a renewal of its business, owed debts that it could not pay, or was hopelessly insolvent.

It is difficult to characterize, courteously, such a contention. A shareholder in a moribund or an

insolvent corporation, or one which is unable to pay its debts save through the application of its property thereto, is in no position to prate about his paramount rights, or to complain that a court to which he resorts for relief against a creditor treats the creditor's right to payment as of prime importance. Apart from that consideration, the disincorporation statute to which counsel refer, Rem. & Bal. Code, §3708, Rem. 1915 Code, §3708, is not a medium for the enforcement of payment of corporate debts. It does not provide for a proceeding *in invitum*. The corporation must voluntarily petition for disincorporation. No method is provided for seizure of the corporate property to satisfy the corporate debts. On the contrary, it provides that there shall be no dissolution until all claims against the corporation are discharged. Evidently here is no medium for the collection of debts.

But on general principles it is idle to contend that if a creditor would take the property of a corporation for the satisfaction of his debt, he must resort to dissolution proceedings. All the means which are available for the collection of a debt from an individual are available for the collection of a debt from a private corporation. An execution will run against it. 6 Thompson, Corporations (1st ed.), §7847. Save where their use conflicts with the trust fund theory of corporate property, writs of attachment may be levied upon its property. *Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176; *State ex rel*

Krisch v. Superior Court, 36 Wash. 91. It may make a common law assignment for the benefit of its creditors. *McKay v. Elwood*, 12 Wash. 579; *Cerf v. Wallace*, 14 Wash. 249. A creditor's bill may be brought against it, and a receiver appointed for the purpose of conserving and disposing of its property for the benefit of its creditors, either because it has made conveyances for the purpose of hindering, delaying and defrauding its creditors, *Sligh v. Shelton Ry. Co.*, 20 Wash. 16, or because it is insolvent. *Davis v. Edwards*, 41 Wash. 480; *Barnard Mfg. Co. v. Ralston Mill Co.*, 71 Wash. 659. And it may give a mortgage to secure the payment of its indebtedness, and, if unable to pay the debt, may convey the mortgaged property, although it is all the property which it owns, in payment of the debt. *Klosterman v. Mason County Ry.*, 8 Wash. 281.

In the light of these authorities, and of the accepted rule stated by the text writers hereinbefore cited, namely, that a corporation has unquestionable power to sell all its property, albeit minority shareholders object, for the purpose of paying its debts, or when business exigencies demand, we cannot think counsel's present contention other than puerile.

Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, is cited with an apparent air of confidence. It is not even remotely relevant to the question here involved. There the lessee of a railway system declined to perform the lease, invoking the familiar

rule that a public service corporation cannot, without express legislative permission, transfer all its property, and thereby disable itself from the discharge of its duties to the public. Counsel who were endeavoring to sustain the lease did not question that rule, but sought to discover the necessary legislative permission in sundry statutory provisions, among others, the statutory right to disincorporate upon complying with certain requirements. The Court held that the statutory provision for a *bona fide* dissolution and termination of the corporate existence was not sufficiently elastic to include a grant to a going concern, which had not suspended its corporate existence and had no intention of doing so, to suspend its operations until it chose to resume them. We are unable to understand how what is said *arguendo* in that behalf, which is what appellants have quoted, can be deemed applicable to the case of a purely private corporation, which is not a going concern, whose business has been made unlawful, and which, being otherwise unable to pay its debts, has conveyed its property in payment thereof.

(b) *Authorization of Conveyance.*

The conveyance which is attacked was executed on behalf of the Brewing Company by Schade and Stritesky, its president and secretary, respectively. Its execution was never formally authorized by the board of directors of the Brewing Company, and it is urged that it was therefore ineffectual to convey title.

Our first answer to that contention is that the

execution of the deed was ratified by the board, and it is therefore immaterial that there was no precedent authorization, for "subsequent ratification * * * is equivalent to previous authority." *Graham v. Boston etc. Ry.*, 118 U. S. 161, 171. That, of course, is merely a particular application of the general rule of agency, that "every ratification relates back and is equivalent to prior authority." 2 Corpus Juris, 516. For illustration of subsequent ratification by corporate authorities being held equivalent to previous authority, see *Kirzein v. Washington Match Co.*, 37 Wash. 285; *Western Timber Co. v. Kalama etc. Co.*, 42 Wash. 620, and *Indianapolis Rolling Mill. v. St. Louis etc. Ry. Co.*, 120 U. S. 256.

The acts of ratification were these: The board of directors of the Brewing Company consisted of B. Schade, Sophia Schade, his wife, and L. R. Stritesky. It appears to have held monthly meetings, and the secretary, Stritesky, read from the minutes of those meetings everything which related to the transaction involved. At the meeting in October, 1917, Schade called the attention of the board to the foreclosure proceeding begun by the Trust Company, stated that he had addressed a letter to the shareholders requesting "an expression of opinion from them in this crisis and means of meeting it," and "ways and means" for meeting the turn in the company's affairs were discussed (Tr., 58). In the letter above referred to, the shareholders were advised that the Trust Company was pressing for payment of the mortgage,

and that "quick action" in the matter of paying the mortgage was necessary, else the mortgaged property would be sold at forced sale, and at a great sacrifice. The opinion of the shareholders as to what should be done was asked, and the letter closed: "Perhaps it would be for the best interests of all concerned to sell outright. This is the plan that I look most favorably to at present." (Tr., 170-171.)

Returning to the minutes of the board meetings, in November, 1917, the advisability of contesting the foreclosure proceedings was discussed, and it was decided to get legal advice (Tr., 57-58). At the December meeting, it was reported that counsel had been secured (Tr., 58). At the February meeting, 1918, at which all the directors were present, the attention of the directors was directed to the foreclosure proceedings, which, the minutes recite, "if carried through the courts would have caused unnecessary expense and no benefits realized." The board was advised that because of this the mortgaged property had been conveyed to the Trust Company, which had given an option to repurchase, expiring in July, 1919, for the amount of the debt. The amount was stated in the minutes, and reference was made to the volume and page of the public record where the agreement was recorded (Tr., 56-57). At every meeting of the board thereafter, the efforts to dispose of the property and their ill success were reported, but no further reference was made to the conveyance until at the July, 1919, meeting, when it was stated

that the property of the company was to pass into the hands of the Trust Company on 1st July, but that it had made no move to take possession (Tr., 59-61). Neither at the meeting when the conveyance was reported to the board, nor at any subsequent meeting, did the board or any member of it express disapproval of the conveyance.

Such a course, it is clear, was an implied ratification of the conveyance by the board, and the implied ratification was as effectual as an express ratification would have been. The Brewing Company was in desperate financial straits. A foreclosure suit, threatening the loss of its entire property, and with a possible deficiency judgment over against the corporation, was pending. It had not a dollar to meet the claim, and the shareholders had been appealed to, evidently without success. Moreover, taxes were delinquent on the property, and a delinquency certificate had been issued against it, which bore interest at the rate of 15% per annum (Tr., 16, 61, 64; Rem. & Bal. Code, §9253). It was certain that the company was going to lose the property, very quickly and in a most ruinously expensive fashion, unless it made an immediate compromise with its creditor. It made the compromise. In consideration of the conveyance the Trust Company took care of the taxes and insurance, dismissed the pending foreclosure suit, cancelled the debt and released the mortgage, allowed (in substance) an additional six months redemption period, and left the company in possession during the

eighteen months period allowed for redemption. If the board of directors desired to object to the conveyance as unauthorized, it is manifest that under such circumstances it was necessary that it act with the utmost promptness, and its mere silence, its mere failure to act, was a ratification.

Very pat in that connection is *Indianapolis Rolling Mill v. St. Louis etc. Ry.*, 120 U. S. 256. We quote from its syllabus:

“A board of directors of a corporation to whom the president of the company communicates his execution of a contract on the part of the corporation, which is within its corporate powers but unauthorized by the board, will be presumed to ratify his act unless it dissents within a reasonable time; and a delay in the disaffirmance of six months after knowledge of the act is an unreasonable delay.”

In *Pittsburg etc. Ry. Co. v. Keokuk etc. Bridge Co.*, 131 U. S. 371, 381, it was said:

“When the president of a corporation executes, in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act.”

For cases in this Court of ratification through failure to object to an unauthorized act within a reasonable time, see *West Side Irr. Co. v. United States*, 246 Fed. 212, and *Mutual Oil Co. v. Hills*, 248 Fed. 257. The rule is the same in the State court. *Blair v. Met.*

Sav. Bank, 27 Wash. 192; *Kirwin v. Washington Match Co.*, 37 Wash. 285; *Western Timber Co. v. Kalama Lbr. Co.*, 42 Wash. 620.

Our second answer to the contention is that the objection that the president and secretary were not formally authorized by the board to execute the conveyance is a purely technical one, to which a court of equity ought not to give heed. A valid mortgage, given to secure a valid debt, incumbered the property. The corporation was without means to pay the debt and save the property, and the shareholders, although informed of the situation and the necessity for taking "quick action" if the property was to be saved, had done nothing. In this strait the executive officers of the Brewing Company conveyed the property in satisfaction of the debt. By so doing they secured concessions not otherwise obtainable, and the corporation lost nothing. The property was lost to the corporation, not by means of the conveyance, but because of its inability to pay the mortgage debt, for if the conveyance had not been made a decree of foreclosure would have divested the title. Under such circumstances, complaint that the conveyance was not formally authorized is an appeal to purest technicality.

In *Wheeler, Osgood & Co. v. Everett Land Co*, 14 Wash. 630, a corporation was sued on a bond on which it was surety. It objected to its liability on the bond that the board of directors had never auth-

orized the execution of the bond. It appeared, however, that a majority of the directors had consulted concerning the execution of the bond and consented thereto, and this was held sufficient, the Court saying that the contention amounted to no more than a claim of "want of formality in the execution of the bond," and that such a contention should not be allowed to prevail. All the directors of the Brewing Company, as matter of course, knew that it was intended to give the conveyance and approved of it, just as they approved of it after it was given. It would be grossly technical to say the conveyance could not stand because it was not authorized by the board.

(c) *Fraud.*

Schade personally guarantied the mortgage notes given by the Brewing Company to the Trust Company, and in the foreclosure suit he was joined as defendant for the purpose of recovering upon his guaranty; Mrs. Schade being also joined as defendant for the purpose of establishing as against her that the guaranty was a community debt, inasmuch as the stock which the Schades owned in the Brewing Company was community property (Tr., 124-125, *Shuey v. Holmes*, 22 Wash. 193). In consideration of the conveyance, the notes and mortgage were cancelled and surrendered, and, of course, all the parties thereto, the Schades as well as the Brewing Company, were released from any liability thereon. This is the first ground suggested for the charge that the conveyance

was fraudulent, because the Schades, a majority of the board of directors, were personally interested in and profited by the conveyance.

A transaction between corporate officers and the corporation is not void, nor will it be set aside upon mere challenge. This Court has said that a corporate officer may deal with the corporation, and that in such dealings no more is required of him than "that candor and fairness which equity imposes as a guide for dealing between him and the corporation," and that the dealings be "open and free from blame," *Cowell v. McMillin*, 177 Fed. 25, 39. In the later case of *In re Lake Chelan Land Co.*, 257 Fed. 497, it said that the validity of such transactions was to be determined by the rules of "conscience and fairness" which courts of equity have prescribed. The rule in the State courts is the same. *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578; *Ritchie v. Trumbull*, 89 Wash. 389.

The same rules govern when a corporate transaction is assailed because it was participated in by corporate officers who were interested in the event.

"Although the law regards with disfavor contracts made by such directors of corporations with themselves, nevertheless such contracts are not necessarily void. The fact of such relationship does not of itself render the transaction fraudulent. While such a transaction is well calculated to arouse suspicion, and calls for a 'rigid and severe' scrutiny in its examination, and requires clear and full proof of a valuable and sufficient consideration and of the good faith of

the parties, still when such examination has been made and such proof has been furnished, the transaction is valid as to creditors and must stand."

Roy & Co. v. Scott Hartley & Co., 11 Wash. 399, 404.

See also: *Budd v. Walla Walla Ptg. Co.*, 2 W. T. 347; *Roberts v. Washington Nat. Bk.*, 11 Wash. 550.

Now, it is undisputed that the debt which was satisfied by the conveyance assailed was a corporate debt, and that Schade's only relation to it was that of a surety. He was, it is true, interested in the discharge of the debt, just as any surety is interested in the discharge of the debt for which he is sponsor. But that was an entirely proper interest, and if he resorted to no improper means to secure the discharge of the debt, his participation in the transaction did not make it questionable. A corporate officer is, of course, under no obligation to loan money to the corporation, or to use his funds or credit for its benefit. *Zeckendorf v. Steinfeld* (Ariz.), 100 Pac. 784. But if he chooses to do so, and the transaction is fair and aboveboard, he is entitled to all the rights, remedies and securities which would be available to a stranger creditor of the corporation. *In re Lake Chelan Land Co.*, 257 Fed. 497; *Thompson v. Huron Lbr. Co.*, 4 Wash. 600; 14a Corpus Juris, 132-135. It follows that if Schade had paid the debt for which he was security, he might, as any other surety might, have compelled the Brewing Company to reimburse him, and for the purpose of reimbursement could

have taken a lien upon or a conveyance of the corporate property. Moreover, there being no question of the justness of the debt due him, his participation as a corporate officer in the transaction by which the lien was given or the conveyance made him would not have been cause for avoiding it. *Brown v. Grand Rapids etc. Co.*, 58 Fed. 286 (opinion by Judge Taft); *Heidbreder v. Superior Ice Co.* (Mo.), 83 S. W. 466.

In the light of these settled rules, an attack upon the conveyance because Schade participated in it, he being interested as a surety in the discharge of the debt, can scarcely be taken seriously. No fraud or collusion between him and the Trust Company is suggested. The debt, a just corporate debt, owing for money borrowed and used in the corporate business, was overdue. The Brewing Company had not a dollar to pay on the debt. Its business was destroyed, and there was no hope that it could ever be resumed. Interest, taxes and insurance were piling up, and a delinquency tax certificate, amounting to nearly \$6,000 and bearing 15% interest, had been issued against its property. There had been talk of foreclosure for a year or two (Tr. 97), and finally foreclosure could be staved off no longer and suit was begun. No claim is made that there was any defense to the foreclosure suit. Oh, true, some stock defenses were pleaded in the answers which were put in to the suit; payment, Schade's mental incapacity, etc., etc. (Tr., 146-158), but these, manifestly, were interposed purely to secure delay, and were not *bona fide*. If the debt had been

other than a just corporate debt, if there had been a shred of defense to the foreclosure suit, the plaintiff in this suit would, of course, have so pleaded in her complaint, and would not have rested her case upon the technicalities which are its sole foundation. Look to her bill (Tr. 2-11), and observe that it is utterly barren of any charge or hint of fraud, collusion, or of anything savoring of a defense to the debt and mortgage. The testimony is equally barren of anything of that sort, while every witness speaks of the debt as a just one and of foreclosure as inevitable. In September, 1917, before the foreclosure suit was begun, Schade sent an appeal to the shareholders of the Brewing Company, telling them that the Trust Company was pressing for payment of the mortgage, and that "quick action" in the matter of paying the debt was necessary else the property would be lost (Tr., 170-171). No defense to the debt is suggested; on the contrary, payment is considered the sole hope for saving the property, wherefore the appeal. But the shareholders, evidently, did not respond. Issues were made up in the foreclosure suit by service of the defendants' answers in November, 1917 (Tr., 152, 159), and the case was set for trial when the settlement was made (Tr., 76, 79). That the settlement was made under the duress of the pending suit and the approaching trial is clear. It so appears from the testimony of Mr. Moore, attorney for the defendants in the foreclosure suit, of Mr. Edge, attorney for the plaintiff in that suit, and of Mr. Geraghty,

attorney for the Brewing Company for many years, until he became Corporation Counsel of the City of Spokane (Tr., 75-79, 96-98). It is not claimed that Schade made the conveyance willingly or pleasantly. In a circular letter sent by him to the shareholders some months after the conveyance was made, he speaks bitterly of the company being "forced", "under pressure of legal proceedings", to deed its holdings to the Trust Company (Tr., 172-174). Every sentence breathes the resentment of the angry, unfortunate debtor, who feels that a creditor has demanded his due with too much harshness. It was natural that Schade, his business ruined by what he, no doubt, considered unjust and confiscatory laws, should feel so, and it is not to be expected that he could see the case from the bank's standpoint: the large debt, running for many years, and long overdue, the unpaid interest, taxes and insurance, the ruined business, illegal and evidently never to be resumed, which precluded any hope of payment, save from the sale of the mortgaged property. Be that as it may, this letter, if it stood alone, would dispel any suspicion of collusion between Schade and the Trust Company. It proves conclusively that Schade did not make the conveyance because of his personal interest or hope of personal gain, but that he was forced to make it by the pressure of the foreclosure suit, and because by making it he gained advantages for the Brewing Company and its shareholders which would have been lost if the suit had gone to trial. There is,

plainly, no room for suspicion of personal interest and personal gain, or of fraud, actual or constructive, in the transaction. That being so the transaction is unassailable.

The second charge of fraud springs from the following state of facts: The deed and option to repurchase agreement left the property affected in the possession of both parties, the Brewing Company and the Trust Company. The Trust Company was given the right to lease the property, but it was provided that the lease should not interfere with, and should terminate upon, the exercise of the option. Any income derived from the property during the option period was to go to the Trust Company, but the amount thereof, after the deduction of sundry enumerated charges, was to be credited on the option price if the option was exercised. Both parties were to use their best endeavors to sell the property, but no sale could be made save on terms satisfactory to both. The Brewing Company was to have keys to all the buildings, and the right of entry for purposes of inspection or exhibition to prospective purchasers. Among other provisions appeared the following:

"IT IS FURTHER UNDERSTOOD AND AGREED that if during the lifetime of this option said second party (the Brewing Company) desires to conduct in the bottling works on said premises a business of its own, or if B. Schade or Sophia Schade, his wife, shall personally operate a business in said bottling works,

that no rental shall be charged therefor as long as said business is conducted by the said Schades personally or by said second party on its own account, but that the same shall not be leased or sublet by the Schade Company or the Schades to any other party or parties whatsoever."

(Tr., 18-19.)

The right thus granted to the Schades, it is said, was such a personal gain, was of such personal interest to them, that their participation in the transaction invalidated it.

Under the decisions of this Court and of the Supreme Court of the State, a corporate officer may participate in a corporate transaction in which he is personally interested if his connection therewith is "open and free from blame", and his course is consistent with the rules of "conscience and fairness" which control courts of equity. It is manifest, therefore, that giving the Schades the right to operate the bottling works, subordinate to the prior right of the Brewing Company to the works if it desired them, cannot be criticized unless thereby the Brewing Company lost something of value to which it was entitled, or the Schades gained something to which they were not entitled. It is folly to claim that any such element was present. Nothing was taken from the Brewing Company. It had conveyed its property in fee simple in payment of a just debt which it owed, and it had no right to any possession and use of the property save such as the grantee chose to concede it. The grantee gave it the right to operate the bottling works if it chose. What did

it lose, what could it lose, by reason of the grantee having given to the Schades an alternative right, a right contingent upon the Brewing Company not exercising its right, to operate the bottling works? Manifestly, nothing. It is not claimed that the Brewing Company desired to or could operate the works. Its history shows it neither desired to nor could do so. The agreement in question was made in January, 1918. Washington went dry in January, 1916. None but a soft drink business could be conducted. For a short time after Washington became dry the Brewing Company had essayed the soft drink business—"not a great length of time and on a very small scale"—and had abandoned the business because it did not pay (Tr., 62-64). It was left without "a dollar's worth of money", it could not pay its taxes (Tr., 64), indeed, could not pay insurance or any other charge that was necessary to be met to keep the property up (Tr., 92-93, 16, 169-170). It was, consequently, without the means to operate the bottling works if it had desired, and it had not the desire because it had tried the soft drink business and failed. Evidently, then, it lost nothing because the Schades were given a subordinate right, or, if you please, an equal right, to operate the bottling works.

Conversely, the Schades gained nothing through the right conceded them. They never exercised it, and could not have expected to exercise it. They knew the Brewing Company's effort to conduct a soft drink business was a failure, and could not have

expected to better the possibilities of the business by running it for themselves instead of for the corporation. Reading the minutes of the directors' meetings through from the beginning of 1918 until the property was finally lost in July, 1919, it will be observed that the only thought in the directors' minds, the one thing to which they bent their energies, was the sale of the property (Tr., 59-61). If it had been possible to put the property to any profitable use, it is evident that some effort in that direction would have been made. Moreover, "The proof of the pudding is in the eating." The Trust Company has had control of the property for over three years. When the deed was made to it, in January, 1918, it had an investment of \$63,650, including the original debt, in the property (Tr., 16). In September, 1919, when it offered to let the shareholders of the Brewing Company in as proportionate owners of the property if they would pay a proportionate part of the debt against it, the amount of the investment had risen to \$76,000 (Tr., 169-170). At the time of the trial it had increased to \$85,000 (Tr., 92). During that entire time the property has not yielded one cent of return; as Mr. Malott, vice-president of the Trust Company, testified: "We have not received any income from the property whatever" (Tr., 92). The situation is eloquent. The property as an entity was designed for a brewery, and as an entity it had no value for any other purpose. The prohibition wave stripped it of all value as an entity. After the futile effort

to get some revenue out of it from the making of soft drinks, those in interest had no hope for realizing anything from it save through the piecemeal sale of the machinery, the scrap value of the buildings, and the speculative value of the realty. It is idle folly to talk of the right given to the Schades to use the bottling works having taken anything of value from the Brewing Company, or having given anything of value to the Schades, or of being an inducement to the Schades to fail in their duty as corporate officers so that they might personally profit.

One word concerning the position of these shareholders who prate of the fraud of the Schades; especially of plaintiff, Schade's niece, who does not let his death (Mrs. Schade now appears as his executrix Tr., 49, 114), disturb her charge of fraud.

When business was good and dividends were frequent, the shareholders were full of interest in the business and regularly attended the meetings. As the dry wave rose higher and there were no more dividends, their interest fell off and they no longer attended the meetings. Finally the Schades and Stritesky were left entirely alone to look after the corporate affairs and save what they could from the wreck (Tr., 62-63). When foreclosure of the mortgage was threatened, Schade appealed to the shareholders for counsel and assistance (Tr., 170-171). If he received either, it does not appear. The fore-

closure suit was brought, issues were joined, and the case was set for trial. Under the duress of that suit, and because there was no escape, he conveyed the property in satisfaction of the debt, and by the option to repurchase secured an eighteen months' redemption period instead of the twelve months' period the statute would have given him. This, it was hoped, would afford him time to make a turn and save something from the wreckage (Tr., 78-79). There is nothing to impugn his good faith, and the fact that he owned 2,600 shares of the 5,000 issued shares makes it certain that he did not make the conveyance in order to defraud the shareholders. The self-evident fact is that the shareholders left him to bear the burdens of the ruined corporation alone. He did what he could to save something, and it is grossest injustice to charge his failure to fraud, instead of to prohibition and the financial stresses of war time, the actual factors which dominated the situation.

The appellants' position is further discredited, not to say exposed as downrightly dishonest, by their subsequent conduct. After the expiration of the option to repurchase, in August, 1919, the Trust Company sent a circular letter to each shareholder of the Brewing Company, offering to give him an interest in the former property of the Brewing Company, proportionate to his shareholdings therein, if he would pay a proportionate amount of the entire debt and investment of the Trust Company (Tr., 165-169). Seven or eight took advantage of the offer (Tr., 94).

Appellants, of course, were not of that number. The property, it seems, is not of sufficient value to them to permit of their paying any part of the just debt which is an incumbrance upon it. It is of sufficient value, however, to induce them to bring a suit for the purpose of defeating a just debt, and getting the property back freed from incumbrance. Well, there are a good many people who see no harm in endeavoring to escape the payment of their just obligations, so it is not particularly surprising to find appellants in that position. It is extremely surprising, though, to find them appealing to a court of equity for aid in their adventure.

It is said that the property of the Brewing Company was of great value, and that it has been lost to the shareholders by the conveyance. Were it of even greater value than is claimed for it, the shareholders would be in no position to complain that they had lost it by the conveyance. The justness and validity of the debt and mortgage which incumbered the property are not questioned. Before the foreclosure suit was begun, they were informed by Schade that the Trust Company was pressing for payment, and that quick action was necessary if they wished to save the property. Why did they not respond to his appeal and advance the funds to pay the incumbrance? Early in 1918 they were informed of the situation by both the Trust Company and Schade, told that either the property must be sold or they advance the means

for its redemption, and were urged to do something before the expiration of the redemption period to save it for themselves (Tr., 93-94, 172-174). Again they would not act. The eighteen months' redemption period expired, the Trust Company freely offered to give the property back to them if they would pay the debt, or upon payment of parts of the debt to give them proportionate interests in the property. Seven or eight accepted, the remainder declined. Whatever the value of the property, it is clear that it was not lost to the shareholders because of the conveyance, but because of their obstinate refusal to pay any part of the debt which incumbered it.

But the values stated by counsel are absurd. They are arrived at by ascertaining the cost of the buildings and what they could have been replaced for, and then taking the opinions of real estate agents and a machinery man as to the value of the land and of the machinery. Such figures, of course, have not the slightest evidential value in this case. The question is not of the speculative value of the property. It is of what could be realized from the property in order to pay the incumbrance upon it. The incumbrance was originally but \$50,000, although by January, 1918, when the conveyance was made, it had risen to \$63,000, due to delinquent interest, delinquent taxes, delinquent everything. The brewing business was destroyed, and the incumbrance could not be paid and foreclosure averted unless by sale of the property. Before the foreclosure suit was begun and after, be-

fore the conveyance was made and after, before the redemption period had expired and after, strenuous efforts were made to sell the property for enough to pay the incumbrance and leave something for the shareholders, and it could not be done. During the same period the shareholders were besought again and again to pay the debt and take the property, and they would not. In the face of these facts, what avails it to take opinion values, speculative values, as the basis for large talk about the injury done the shareholders by the conveyance? If there were real value, salable value, in the property exceeding the incumbrance upon it, it would have been sold for enough to pay the debt, or the shareholders would have paid it and taken the property. Unquestionably the property cost much more than the incumbrance. It was designed, acquired and constructed to be used, as an entity, for a brewing plant. So long as the brewing business remained lawful, the property, as an entity, was no doubt of considerable value. The prohibitory laws, State and National, destroyed the business and with it the substantial value of the property. There remained the speculative value of the land for any useful purpose to which it might be adaptable, the scrap value of the material in the buildings, and the piecemeal value of the machinery, so far as it was adaptable to other purposes. What the real salvage value was is best shown by the fact that it could not be sold for enough to pay the in-

cumbrance, and that the shareholders would not pay the debt in order to get the property.

II.

Whether our position upon the points heretofore discussed is or is not sound, it is nevertheless clear that this suit is not maintainable. Appellants do not offer to do equity or restore the *status quo* if the conveyance be set aside. On the contrary, they resent the notion that anything of the sort can be required of them, and inveigh against Judge Rudkin because of his belief that in seeking the aid of a court of equity they should conform to equitable principles. Their conduct clearly deprives them of any right to equitable relief.

Let us briefly review the pertinent facts before presenting the controlling authorities.

The transaction involved originated in 1914, when the Trust Company loaned the Brewing Company \$50,000, and took its notes therefor, secured by a mortgage on all its property (Tr., 92-93, 124-144). For emphasis we repeat that the justness and validity of the debt and mortgage have never been questioned. Idaho went dry in 1915, Washington in 1916, Oregon about the same time, and in 1917, with the adoption by Congress of the resolution submitting the Eighteenth Amendment, no doubt remained that the whole United States would soon be dry. The business of the Brewing Company was destroyed, it was left without a dollar, and it had no resource for the pay-

ment of the incumbrance upon its property except a sale of the property, unless, perchance, its shareholders chose to come to its rescue. They did not choose to do so, and a foreclosure suit was begun. By the terms of the settlement under which the mortgaged property was conveyed in payment of the mortgage debt, the Trust Company paid taxes and insurance premiums on the property amounting to about \$6,400 (Tr., 16). By reason of the settlement the foreclosure suit was dismissed with prejudice, and the notes and mortgage were surrendered and canceled (Tr., 175, 95-96). By September, 1919, when the Trust Company, after expiration of the redemption period, offered the property to the shareholders if they would pay the debt, or participation in the property if they would pay a part of the debt, its expenditures for taxes, insurance, repairs, judgment, etc., amounted to an additional \$5,000 (Tr., 169-170). Since then its expenditures have gone on, of course, until at the time of the trial it had sunk about \$85,000 in the property (Tr., 92). In 1920 it received \$12,000 from the sale of certain machinery from the plant (Tr., 122-123), but that meant, of course, an impairment by so much of the original security it held for its original debt of \$50,000, and is not income arising from use of the property which would mitigate the loss it has suffered by its advancement of taxes, insurance, etc., since it has been in possession of the property.

Now what seeks plaintiff by this suit? We do not

refer to her co-appellant, for it adopts her position. Downrightly, barefacedly, she seeks the setting aside of the deed to the Trust Company and the return of the property to the Brewing Company, discharged of all the claims of the Trust Company against it. Neither in the body of the bill nor in the prayer is there the slightest suggestion that equity requires aught of her, or that she is willing to do equity if aught be required of her (Tr., 2-12). The Brewing Company, to whose possession she demands that the property be returned, had borrowed money from the Trust Company and given it security by a mortgage on the property. The debt has been cancelled and the security released. She neither offers to pay the debt nor to restore the security. For several years the property was abandoned by the Brewing Company and its shareholders. Had not the Trust Company paid the taxes upon it, and kept the buildings and machinery insured and in repair, it would have been lost to them ere now. She neither offers to repay the advances nor to agree that they may be made a charge upon the property. There is nothing in the testimony to relieve the inequity of the bill. No offer to pay the debt or restore the security appears; no offer, even, to repay the disbursements made to save the property for plaintiff and the other shareholders on whose behalf she sues is shown. And in his opinion Judge Rudkin remarks that it was conceded that the shareholders did not have the means to effect a redemption, and, further, "that if they had the means

it would not be deemed advisable to employ them in that way" (Tr., 47). The case, then, is an undisguised attempt to obtain the aid of a court of equity to set aside a conveyance and obtain the return of property, relieved from valid incumbrances upon it, and without the repayment of money loaned upon its security and advanced for the purpose of preserving it.

Under the local law of Washington governing the relation of mortgagor and mortgagee, without resort to general equitable principles, appellants cannot, taking the position that they do, maintain this suit. No more can be said of the conveyance than that it was voidable. It conveyed an apparent perfect title, and the decree of a court of equity was required to avoid it; witness this suit and the allegations in plaintiff's bill that it was beyond the power of the Brewing Company or its officers "to have said deed * * * * set aside without a resort to a court of equity", and that "plaintiff is remediless at law and the exercise of the equitable powers of this Court are necessary to redress plaintiff's wrongs * * * in the conveying of all of the property", etc. (Tr., 11.) The Trust Company went into possession under the deed, and is now in possession. It is the settled law in Washington that if a mortgagee goes into possession of the mortgaged property, albeit without the consent of the mortgagor, under a void instrument purporting to give him title, e.g., a void decree of foreclosure and sale, he is to be regarded as a mortgagee in possession, and entitled to all the benefits accruing to that position.

Neither the mortgagor, therefore, nor any one claiming under him, is entitled to a setting aside of the sale, recovery of the property, or any other relief, unless he offers to do equity and pay what is justly due the mortgagee, including taxes paid and repairs and improvements made by the mortgagee while in possession. *Investment Securities Co. v. Adams*, 37 Wash., 211, *Sawyer v. Vermont L. & T. Co.*, 41 Wash., 524.

In the case at bar the plaintiff sues on behalf of the Brewing Company. She occupies a purely representative position. She cannot maintain the suit if it could not; she is not entitled to relief if it would not be. Under the above decisions it could not maintain this suit without offering to pay the Trust Company what was justly due it, and so she cannot maintain it without making such an offer.

It may be remarked that as the above decisions relate to the respective rights of mortgagor and mortgagee, arising from instruments under the State law, they establish a rule of property which will be followed by the Federal courts. *Parker v. Dacres*, 130 U. S., 43. However, they are but the application to local laws of a rule long settled in the Federal courts. *Bryan v. Kales*, 162 U. S., 411, *Romig v. Gillett*, 187 U. S., 111.

Turning to general equitable principles, one who seeks to rescind a contract as *ultra vires*, for fraud, etc., must put the other party *in statu quo*. *Grymes v.*

Sanders, 93 U. S., 55, *Pullman's Car Co. v. Transportation Co.*, 171 U. S., 138, *Sherbloom v. Faussett*, 99 Wash., 680. In *Alaska etc. Co. v. Solner*, 123 Fed., 855, this Court held that a corporation could not maintain a bill to set aside an unauthorized sale of the corporate property without showing a tender back of the consideration received, or without an unequivocal offer in the bill to return it, saying that "The tender must be without qualification or conditions," under the fundamental rule that "He who seeks equity must do equity." In *Jenson v. Toltec Ranch Co.*, 174 Fed., 86, 92, the Circuit Court of Appeals for the Eighth Circuit, dealing with an *ultra vires contract*, said:

"Courts of equity do not restore money or property to corporations that have obtained them by means of contracts or conveyances beyond their powers, until those corporations first restore the money or property they have secured thereby, or its value. He who seeks equity from these courts must first do equity."

In *Shafer v. Spruks* (C.C. A., 3d Circ.), 125 Fed., 480, the receiver of a corporation brought suit to set aside an issue of bonds secured by a mortgage upon the corporate property. In denying relief the Court said:

"As the receiver simply stands in the dairy company's shoes, the case is one between that company and the holder of its bonds. Moreover, it is the dairy company that is here seeking relief in a court of equity, a right to resort to whose aid is always based on that golden rule of equitable procedure, that he must do, who seeks, equity."

* * * * *

"As noted above, no rights of third parties are here involved. The case is one between the original parties, the obligor, and the holder of the bond. Under such conditions and with the obligor receiving and still retaining the par proceeds of the bonds, it has no standing to invoke the aid of a court of equity to repudiate and disavow the act which secured the retained benefit from its obligee. This is in accord with the general salutary principle that a principal cannot retain the benefit of *ultra vires* acts and at the same time repudiate them; for, if, as held in *Chapman v. Douglass*, 107 U. S., 355, 2 Sup. Ct. 62, 27 L. Ed. 378, a legal liability springs from a moral duty to make restitution, it logically follows that a failure to make such restitution creates an equitable disability in him who inequitably retains."

The rule is the same in the State courts. *Graton & K. Mfg. Co. v. Redelsheimer*, 28 Wash., 370, *Flanagan v. American etc. Co.*, 108 Wash., 569, *Moore v. American Sav. Bk.*, 111 Wash., 148.

What have appellants to urge to overcome the salutary rule declared in the above decisions? Principally, that the conveyance was *ultra vires*, and that a court of equity is so avid to upset *ultra vires* transactions that it will disregard the equities involved. Such a position needs no remark. Next they say that the Trust Company gave nothing and the Brewing Company received nothing except through the medium of the original \$50,000 loan and the mortgage given to secure it, and that no benefit was conferred and nothing of value parted with by reason of the conveyance, wherefore equity demands nothing as a condi-

tion to its avoidance. If the premise were true the conclusion would be false. The Trust Company is a mortgagee in possession, and therefore the instrument under which it went into possession cannot be avoided and it be ousted without payment of the mortgage debt. But the premise is false. In consummation of the settlement under which the conveyance was given, and subsequent to and by virtue of the conveyance, the Trust Company paid out between \$10,000 and \$15,000 for taxes, insurance and repairs on the property. It was necessary to make these payments in order to conserve the property, and if the Brewing Company gets the property back by this suit, it will, of course, be benefited by those expenditures.

Finally, it is urged that they received nothing and therefore cannot be required to return anything. Analyzed, their argument is that it was the Brewing Company which received the benefit of the transaction; that they, mere shareholders, got nothing, and therefore, while they sue upon a cause of action which belongs to the corporation, and whatever they recover will go to the corporation, yet they are under no obligation to do the equity which would have been demanded of the corporation had it brought the suit.

The proposition is rather staggering. They sue for the corporation, to recover its property, and whatever they get will go to it, yet they cannot be required to return what it would have been forced to return in order to recover its property. If this be sound, how easy it will be for a corporation to escape the burden

of doing equity. It need but refuse to sue, a shareholder sues, and, Presto! the thing is done. But of course the position is not sound. Where a shareholder sues on behalf of a corporation, his cause of action is a derivative one, and he "who asserts a derivative cause of action must establish the existence of a cause of action in the party whose rights are sought to be enforced. A cause of action cannot be derived from a source in which it does not exist." *Waters v. Horace Waters Co.* (N.Y.), 94 N.E., 602. That the cause of action which the shareholder possesses is the same as that of the corporation, no greater, no less, see 6 Fletcher, Cyc. Corporations, §4061, 2 Machen, Corporations, §1183. To the particular point here involved, we quote from the syllabus in *Collins v. Penn.-Wyo. Cop. Co.*, 203 Fed., 726:

"Stockholders of a corporation in a representative action were not entitled to set aside a mortgage securing bonds issued by the company to pay debts, without offering to return the money received from the bondholders, so as to place them in statu quo."

We quote also from the syllabus in *Wrightsville Hdwr. Co. v. McElroy* (Pa.), 98 Atl., 1052:

"A bill in equity by minority stockholders of a Pennsylvania corporation for the cancellation of bonds issued to take up notes of the corporation, given in payment for the bonds of a corporation of another state, is properly dismissed, where the Pennsylvania corporation has not offered to return either the notes or bonds to the foreign corporation."

The Supreme Court in its opinion, quoted and approved the following language from the opinion of the chancellor in dismissing the bill:

“Even if it was conceded that the issue of the bonds, or of both the notes and bonds of the Wrightsville Hardware Company, was *ultra vires*, still the rule of law is the same with corporations as with individuals. Neither can retain the profits of a transaction, or anything of value received from the other party thereto, and set up *ultra vires* as a defense to the enforcement of the contract. To do so would be unconscionable, and is therefore impossible in a court of equity. He who seeks equity must do equity. The cases are legion, and from many courts, in which this sound rule of equity and common honesty has been enforced.”

The syllabus in *Spencer v. Clarke*, 1 N.Y. Supp., 533, is thus:

“A complaint by a stockholder of a corporation seeking to enforce a right of the corporation to have certain bonds issued by it, and the mortgage given to secure the same, canceled, is defective on demurrer if it does not contain an offer to restore to the holders of the bonds what the corporation has received therefor.”

See also: *Fleckenstein v. Waters* (Mo.), 61 S.W., 615, *Jones v. Green* AMich.Q., 88 N.W., 1047, and *Harpending v. Munson*, 91 N.Y., 650.

Appellants point out that they own but a tithe of the corporate stock, and ask upon what principle they can be required to pay all the corporate obligation as a condition to maintaining the suit.

If a shareholder's suit to recover corporate property

was on behalf of himself alone; if for the purposes of such a suit he was considered to be an undivided owner of the corporate property, proportionate to his shareholdings, and his recovery would be limited to his proportionate share of such property, there would be more of reason in the claim that he ought not to be required to return all the benefit which the corporation received from the transaction sought to be avoided. If a suit brought on such a theory were conceivable, it would be conceivable that it should be held that as the shareholder could recover but his share of the property, he should be required to return no more than his share of the benefits received. But, a shareholder's suit being what it is, reason balks at the point appellants would make. This suit is on behalf of the corporation, of all the shareholders in the corporation. If it succeeds the entire property will go back to the corporation, for the benefit of all its shareholders. As appellants assumed to represent the corporation and all its shareholders for the purpose of recovering the corporate property, they must assume to represent the corporation and all its shareholders for the purpose of offering to do what it is necessary should be done before the property can be given back to the corporation. They have done nothing of the sort; on the contrary, they have flatly declared that neither the corporation or its shareholders were able or willing to pay anything or return any benefit received. The situation and their position was thus tersely summed up by Judge Rudkin:

"The mortgage has been satisfied of record; the mortgagee has been placed in possession by the mortgagor, and the mortgage debt has not been paid. Under such circumstances the utmost relief that could properly be granted to either the corporation or the stockholders would be a right of redemption. If under any circumstances this suit could be treated as a suit of that character or for that purpose, it should at least appear that either the corporation or the stockholders are ready and willing to pay the amount due on redemption. No such readiness or willingness is averred in the pleadings, and no such readiness or willingness was disclosed at the trial. Counsel frankly conceded that the stockholders did not have the means to effect a redemption, and further conceded that if they had the means it would not be deemed advisable to employ them in that way."

A court of equity, in other words, is asked to relieve the corporation of a debt of \$85,000, the benefits of which it has received and the justness of which is not questioned, and to give the mortgaged property back to the corporation, freed of all incumbrances upon it, for no better reason than that the corporation and its shareholders are unable, or do not deem it "advisable", to employ their means in payment of the debt!

Several authorities are cited by appellants which are supposed to sustain their position that it is unnecessary for them to offer to do equity in order to obtain relief. The first is *Franklin v. Havalena Mining Co.* (Ariz.), 141 Pac., 727. In that case a demurrer to a complaint upon the ground that it did not state

sufficient facts to constitute a cause of action was sustained, and the sole question was whether the stated facts were sufficient. The facts involved, therefore, were simply such as the plaintiff chose to state as ground for relief and, quite naturally, did not disclose any benefit received by the corporation from the transaction attacked or any equities in the other parties to the transaction. It showed merely that officers of a corporation, without authority, had made a highly disadvantageous lease of its property, and that the lessees had gone into possession of the property thereunder. It showed that the lessees had paid nothing and that the corporation had received nothing because of the lease, but that, on the contrary, the lessees had taken possession of the leased property and made large profits therefrom. The court held that the complaint was sufficient without any offer to do equity because it did not "disclose a single equity" in favor of the defendants. It scarcely needs remark that if there was no equity in the defendants' possession of the property, there need be no offer to do equity as a condition to ousting them.

A second case is *Citizens Savings etc. Co. v. Railway Company*, 182 Fed., 607. This again was disposed of on demurrer to the bill. It was a suit to set aside certain juggling contracts, or so alleged to be, by which one railway company had acquired possession of other railway lines without authority and in wrong of the shareholders of the latter. It was expressly declared in the opinion that the bill disclosed nothing

whatever of value received by the corporation on whose behalf the suit was brought, nor nothing of detriment to the corporation whose possession of the property was attacked, and under such conditions it was held, quite naturally, that there need be no offer to do equity.

The other decisions cited are so utterly and absurdly irrelevant to the case at bar that it would be idle to remark upon them.

We submit that Judge Rudkin's decision that the appellants' case is "entirely devoid of equity" is right, and should be affirmed.

Respectfully submitted,

F. H. GRAVES,

W. G. GRAVES,

B. H. KIZER,

Solicitors for Appellee.

